Supreme Court, U. S.
FILED
JAN 16 1978
MICHAEL RODAK, JR., CLERK

in the

# Supreme Court of the United States

OCTOBER TERM, 1977

No. ~~77-~~1010

MIAMI HERALD PUBLISHING COMPANY, GENE MILLER, TIMES PUBLISHING COMPANY and ANGEL CASTILLO

*Petitioners,*

*v.*

THE HONORABLE BEN KRENTZMAN
United States District Court for
the Middle District of Florida

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## OPINION BELOW

The opinion of the Court of Appeals, reported at 558 F.2d 1202, appears in the Appendix to this Petition. No formal opinion was rendered by the District Court, but excerpts of a transcript of the hearing in which the District Court explained its actions, a written order based on that explanation and affidavits describing further actions based on the District Court's explanation are also included in the Appendix.

## JURISDICTION

The judgment of the Court of Appeals was entered September 12, 1977. A timely petition for rehearing *en banc* was denied without opinion on October 18, 1977, and this petition for certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

**1.**

Whether a Federal Trial Judge violates Constitutional safeguards when he uses "trial management" techniques to close trial proceedings solely to limit press coverage of a trial when there exists merely a "bare possibility" of preiudice to a fair trial.

**2.**

Whether, a Federal Trial Judge can utilize "trial management" techniques to limit the



news concerning a trial without violating common law rights to open judicial proceedings and records when there is no showing open proceedings and records will prejudice a fair trial.

**3.**

Whether, in the exercise of its supervisory power, this Court should require a Federal Trial Judge to afford notice and hearing to affected parties prior to entry of an order closing a judicial proceeding, reduce such order to writing and exhibit compliance with Constitutional requirements.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First, Fifth, and Ninth Amendments to the United States Constitution. The relevant portions of those Amendments are:

*First Amendment:* "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

*Fifth Amendment:* "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

*Ninth Amendment:* "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

## INTRODUCTION

This petition arises from a collection of orders entered and actions taken by a federal trial judge restricting public and press access to documents, testimony and legal argument during the lengthy trial of former United States Senator Edward J. Gurney.[1] These restrictive orders were not docketed and when entered were not publicly disclosed. Petitioners discovered their existence only from experiencing their impact.

[1]Senator Gurney was tried twice and ultimately acquitted. This petition involves the first of these trials (*U.S. v. Gurney*, U.S.D.C., M.D.Fla., Case No. 74-122-Cr), which began on February 24, 1975 and ended on August 6, 1975. Respondent was the presiding judge at this trial.



In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), this Court set forth constitutional standards applicable to trial judges' use of direct prior restraints on publication to prevent pretrial publicity relating to criminal cases. Although this Court did not there rule that such prior restraints could never be entered, the standards set forth may well point to that conclusion.[2] Nevertheless, this Court's decision in *Nebraska Press Association* and its reliance on *Sheppard v. Maxwell*, 384 U.S. 333 (1966) suggested several possible alternatives in the nature of "trial management" might exist. Since *Nebraska Press Association*, trial courts seeking to control trial publicity increasingly have employed the suggested trial management techniques and, in this and some other cases, have used techniques not suggested.

Trial management techniques utilized have fallen into two categories: "no comment" orders to trial participants, and "closure" orders closing trial proceedings and documents to press and public. "No comment" orders, specifically mentioned in *Nebraska Press Association. supra*, and *Sheppard v. Maxwell, supra*[3], do not directly affect the proceedings themselves; instead they directly restrain the extrajudicial conduct of persons over whom the Court already has jurisdiction, and only collaterally affect persons (such as press and public) outside the judicial system. In contrast, "closure" orders do not directly restrain persons within the judicial system; instead they close normally public proceedings

[2]*See Id.*, at 570, 570-71 (White, J., concurring); *Id.*, at 572, 572-73 (Brennan, J., concurring); *Id.*, at 617 (Stevens, J., concurring).

[3]427 U.S. at 553-554, 384 U.S. at 362-363.

and seal normally public records, and their direct impact is on persons outside the judicial system, specifically, press and public.

A majority of the Circuit Courts have rendered decisions discussing the standards for use of trial management techniques. One Circuit has dealt with both types, holding a closure order sealing judicial documents a prior restraint[4] and presumably subject to *Nebraska Press Association* tests, but holding a no comment order sustainable if a "reasonable likelihood" of threat to a fair trial be shown.[5] Four other Circuits have dealt with no comment orders, two (the Sixth and Seventh Circuits) permitting their entry only when they are necessary to alleviate a "serious and imminent threat" to a fair trial[6] and two (the Ninth and Tenth)[7] apparently joining the Fourth in the "reasonable likelihood" test. Other than the Fourth Circuit, only the Fifth Circuit in this case has addressed a closure order, and it endorsed entry of such orders if the trial judge finds a "bare possibility" of danger to the administration of justice.

In short, six of the eleven Circuit Courts have rendered decisions on the use of trial management devices and applied at least three different standards. Furthermore, the highest courts of several states have rendered decisions in this area and are in comparable disagreement.[8] This case affords this Court the opportunity to articulate the proper constitutional standards for closure of judicial proceedings and thus provide much-needed guidance on important questions of constitutional law not only unresolved but increasingly recurring after *Nebraska Press Association, supra.*

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[4]*In Re The Washington Post Company, et al.*, No. 76-1695 (4th Cir., July 19, 1976) (App. 67).

[5]*See Central South Carolina Chapter, Society of Professional Journalists, et al. v. Martin*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, No. 77-263 (January 9, 1978). Judge Widener was on the panel in both Fourth Circuit decisions.

[6]*CBS, Inc. v. Young*, 522 F.2d 234, 241 (6th Cir. 1975); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976).

[7]*United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969), *cert. denied*, 396 U.S. 990 (1969). The Solicitor General has stated the "reasonable likelihood" test was also adopted by the Ninth Circuit in *Farr v. Pitchess*, 522 F.2d 464, 468 (1975), *cert. denied*, 427 U.S. 912 (1976). See Brief for Respondent in Opposition, *Central South Carolina Chapters, Society of Professional Journalists, et al. v. Martin, supra* note 5.

[8]One of these decisions is the subject of an appeal to this Court. *Philadelphia Newspapers, Inc., etc., et al. v. Jerome*, No. 77-308. The Pennsylvania Supreme Court's decision was vacated and the case remanded for further proceedings to clarify the record on January 9, 1978.

## STATEMENT OF THE CASE

### I. The District Court

1. *The Public Interest in the Trial.*

The charges against Senator Gurney, criminal misuse of office, had been the subject of extensive news coverage by Petitioner newspapers and all other Florida newspapers, radio and television stations for the two years prior to the trial. Petitioner reporters were assigned to daily coverage of the trial and representatives of many print and broadcast media also attended the trial.

The press and broadcast trial coverage was balanced and subdued. No intimation of "sensational" coverage was made. The judge complimented the press on its reporting (App. 34, 36).

2. *Conduct of the trial.*

The trial judge daily gave standard cautionary instructions.[9] Incontestably these instructions were proper; equally incontestably these instructions were followed (App. 33, 36). The jury was not sequestered until it commenced deliberations.

[9]He daily instructed all jurors "not to discuss the case, not to read any newspapers other than those cleared by counsel and given to the jurors by the Clerk, and not to listen to or view broadcasts concerning the trial". 558 F.2d at 1205.



3. *The Restrictive Orders.*

With the admitted purpose of preventing publication of matters not submitted to the jury,[10] the trial judge entered orders and took actions so as to close to press and public portions of the trial proceedings not submitted to the jury. These actions included (i) bench conferences while the jury was absent from the courtroom, (ii) sealing of transcripts of bench conferences, (iii) sealed communications between judge and jury after its sequestration, (iv) instructions to the court clerk to refuse inspection of exhibits in evidence exhibits presented in open court but not yet admitted into evidence, exhibits offered but rejected, and court exhibits, (v) limitations on public or press inspection of all exhibits, and (vi) instructions to trial participants not to speak to the press.[11]

(i) *Bench conferences*

A complete transcript of the trial was never prepared, but a partial transcript of the trial showed some 400 bench conferences which, if transcribed, would apparently cover 4,000 pages. Many of the bench conferences were held with the jury excused.[12]

[10]That the press was the target of these various actions was acknowledged by the Fifth Circuit. 558 F.2d at 1206.

[11]The trial judge's no comment orders were not the subject of the appeal to the Fifth Circuit and their validity is not challenged by this Petition.

[12]This information was determined by a review of the record made by Counsel for Petitioners in December, 1977. This record was mainly prepared in connection with the second trial of Senator Gurney after this appeal was taken to the Fifth Circuit.

These bench conferences involved proffers of testimony or exhibits, objections, legal argument, and rulings. One bench conference involved a 26 minute testimonial proffer, after the jury was excused from the courtroom, by one of Senator Gurney's codefendants as to whether the government promised not to indict him if he changed his testimony as to a key conversation involving Gurney. (App. 45-46)

Despite the jury's absence and the obvious public interest in the issue raised by the question, the judge carefully staged the proffer at the bench so as to be inaudible to press and public.

(ii) *Sealing of transcripts*

Whenever Petitioners sought transcripts of bench conferences, the judge ordered the transcripts sealed. Thus:

> Those matters were proffered outside of the presence of the jury and I have directed the court reporter to seal them. You will not be able to get that. (App. 47).

(iii) *Judge-jury communications after sequestration.*

After the jury was sequestered for its deliberations, the jury delivered to the judge a written communication relating to one of the judge's jury's instructions. The judge summoned the attorneys to a 38 minute bench conference which, although the jury was sequestered, was conducted so as to be inaudible to press and public. After a lengthy recess to prepare a written response, the



judge held another bench conference with the attorneys. The jury request was then made a court exhibit, which the press then sought to inspect. The judge refused and ordered the exhibit sealed. (App. 47-48). The next day, the judge replied in writing to the jury. Again the press sought to inspect the reply and again the judge refused and sealed the exhibit. (App. 52-53).

(iv) *Denial of permission to inspect exhibits.*

As the Fifth Circuit summarized, "After the trial got under way . . . the appellant newsmen sought to inspect various documents and exhibits, some of which were in evidence and some of which were only identified. The Clerk refused access to many of these items pursuant to oral directions of the district judge." 558 F.2d at 1205. As the judge stated:

> ". . . And, Mr. Castillo, you are not going to be allowed to look at all the exhibits received in evidence but not read to the jury. And if that be trespass on the First Amendment, so be it . . . that is what I am going to do." (App.40).

(v) *Limitations on access to all exhibits.*

The trial judge did not restrict inspection to a "pool" reporter or specify times for inspection. Instead he simply limited access to the clerk's administrative convenience and declined to establish any standards for exercise thereof. 558. F.2d at 1209, n. 11

4. *Non-disclosure of Existence or Scope of Closure Orders*

The judge did not make public his closure orders nor did he give press or public prior or subsequent notice of his intent to issue them or their issuance; obviously, no opportunity to be heard thereon was afforded. For example:

> If, to present a fair trial in this Courtroom, I have to stop and enter a written Order every time I do it — if somebody tells me I have to do it, I will do it, but not until. And I am not going to have a hearing and give a due process hearing to the press before I do it." (App. 34).

The press and public were thus unaware of the orders until their impact was perceived. Much information about the nature and extent of the closure orders and the trial judge's admission as to their purpose were not divulged until Petitioners moved to vacate those orders of which they had become aware, and a hearing was held on this motion.

5. *The orders were routinely entered without regard to the rights of press and public.*

In entering the closure orders, the trial judge was concerned only with ensuring a fair trial, although he was aware of the threat such orders present to the public auditing of the administration of justice. (See, e.g. App. 57, 63).

The trial judge's stated reason for his restrictive orders was the "bare possibility" the jury would violate his



cautionary instructions and read the newspapers, even though he stated he had no reason to believe any juror would do so and he simultaneously complimented the press on its reporting of the trial.[13]

## II. The Fifth Circuit

The Fifth Circuit affirmed the District Court's orders. While noting "the questions presented here could affect many other cases" but were "largely unsettled", 558 F.2d 1207, that court's rationale for its decision is not clear.

The court characterized the case as one of "access" or "news gathering" but did not make that issue dispositive. Thus, while concluding that under *Pell v. Procunier*, 417 U.S. 817 (1974), press access should not exceed that of the public,[14] the court stated that "what right of access the public has . . . , [which] has yet to be

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[13]THE COURT: . . . I hope that the jury is not reading what is in the newspapers. I don't think they are. But there is always that bare possibility.

* * *

I mean the press is doing actually a remarkable job.

I have come to a renewed appreciation for investigative journalism." (App. 36).

[14]Contrary to these implications in the Fifth Circuit's opinion, Petitioners have not asserted here a greater right of press than public to witness a trial. Although this Court has observed the special posture of the press in trial coverage for the public benefit (*Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975)), and although adequate management may require use of a "pool reporter" for access to trial events rather than the general public, the interests of press and public in the subject matter here are identical.

defined by the Supreme Court, is not required [to be determined] by the limited questions presented for review here." 558 F.2d at 1209, n.10 The court also apparently in part based its decision on its erroneous belief that alternative sources existed for the information sought, 558 F.2d 1208.[15]

The key to the Fifth Circuit's decision is its conclusion that closure of portions of the trial did not involve First Amendment protections. This being so, there were no limitations on the trial judge's selection of "trial management" techniques:

> "The First Amendment does not protect against whatever incidental burdens on newsgathering occurred in this case. The trial judge employed reasonable 'remedial measures', far short of prior restraints, to prevent *possible* prejudice and maintain an orderly trial. See *Sheppard, supra,* 384 U.S. at 362, . . . The district court's rulings denying press access implemented a legitimate governmental interest in securing for the accused the fair trial guaranteed them by the Sixth Amendment. The court's actions bore a *reasonable relation* to the achievement of that purpose." 558 F.2d at 1211 (emphasis supplied)

The Fifth Circuit, concerned with the " 'heavy obligation [which] rests on trial judges to effectuate the fair-

[15]The Fifth Circuit suggested that "the parties, the witnesses, the attorneys, and members of the public generally" were sources of information. 558 F.2d at 1208, n. 8. In fact the defendants and their attorneys had been subjected to a no comment order. (App. 57, 59).



trial guarantee of the Sixth Amendment.' *United States v. Columbia Broadcasting System, Inc.,* 497 F.2d 102, 104 (5th Cir. 1974)," afforded the trial judge broad discretion and concluded that within his inherent power over trial management the trial judge may not only seal the lips of trial participants but may also close portions of the trial itself if that closure order bears a "reasonable relation" to protecting Sixth Amendment interests. By its reference to "possible prejudice", the Fifth Circuit apparently approved the trial judge's "bare possibility" justification for his orders.

The Fifth Circuit thus believes closure orders need not be based either on (i) any shown degree of prejudicial publicity or (ii) any shown degree of necessity for the degree of restriction employed.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION BELOW RAISES A SIGNIFICANT, RECURRING AND UNRESOLVED PROBLEM CONCERNING THE POWER OF TRIAL JUDGES TO CLOSE PORTIONS OF PUBLIC TRIALS TO THE PUBLIC AND PRESS AND THE CIRCUMSTANCES UNDER WHICH SUCH POWER MAY BE EXERCISED.

(a) *The decision below raises the significant question of what circumstances justify the entry of orders closing portions of trial proceedings and records to press and public.*

This case goes to the heart of current issues of fair trial-free press.[16] The Fifth Circuit here has accorded federal trial judges under its supervision virtually unlimited discretion to selectively close portions of public trials whenever they perceive the "bare possibility" of prejudice to the administration of justice. Since *Nebraska Press Association,* and possibly in part because of that decision a number of other courts, a Congressional Committee, and an ABA Committee appointed to study the problems raised by closure orders have considered what standards should be applied to

[16]Justices of this Court have recognized the issue of closure orders as one of constitutional dimension, yet unresolved. *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 564, n. 8; 427 U.S. at 576, n. 3 (Brennan, J., concurring, joined by Stewart and Marshall, J. J.)



"trial management" techniques, with varying results. All authorities, however, including the Fifth Circuit, acknowledge the "importance of the rights involved" the "continuing nature" of the problem, and that "many other cases" will be affected by the resolution of the issues. 558 F.2d at 1207.

With the exception of the Fifth Circuit, no authority has approved standards permitting closure of judicial proceedings or records *after commencement of the trial* without a showing meeting stringent "clear and present danger", "serious and imminent threat" or similar tests. See e.g., *State v. Allen,* 373 A.2d 377 (N.J. 1977) (applying such standards to bench conferences and other in camera proceedings); *In Re Washington Post Company, et al., supra* note 4; *United States v. Mitchell,* 551 F.2d 1252 (D.C. Cir. 1976), *cert. granted sub nom Nixon v. Warner Communications, Inc.,* 45 U.S.L.W. 3651 (1977); "Free Press-Fair Trial," A Staff Report of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 2d Sess. (1976), draft report, ABA Legal Advisory Committee on Fair Trial and Free Press (August 1977). As was stated in commentary to Standard 3.5 of the ABA Legal Advisory Committee's draft report, "The presumption is strongly in favor of open judicial proceedings and unsealed records."

If permitted to stand the Fifth Circuit's decision will prevent the press from being the "handmaiden of ef-

fective judicial administration,"[17] closely auditing judicial power and critically evaluating the judicial process; instead the press will be relegated to what this Court has held it is not — a "passive receptacle or conduit for news . . ."[18] the judiciary is willing to make public.

(b) *The "standard" for closure endorsed by the Fifth Circuit conflicts with decisions of other courts of appeal and state courts as to the requirements for entry of closure orders.*

1. *Courts of Appeals.*

The Courts of Appeals which have considered the propriety of the use of trial management devices have applied at least three, possibly four, different tests:

(i) *Fourth Circuit on "closure" orders: a "prior restraint" test.*

In *In re Washington Post Company, supra,* the Fourth Circuit equated a trial court's sealing of court files with a "prior restraint". (App. 68) Although the court made no reference to any test, presumably it would apply the standards of *Nebraska Press Association* to this as it would to all other prior restraints.

(ii) *Fourth and Tenth (and possibly Ninth) Circuits on "no comment" orders: the "reasonable likelihood" test.*

The Tenth Circuit and more recently the Fourth Circuit[19] have concluded no comment orders are justified where there is a reasonable likelihood of prejudice to a fair trial.[20]

(iii) *Sixth and Seventh Circuits on "no comment" orders: the "serious and imminent threat" test.*

The Sixth and Seventh Circuits have held no comment orders can only be imposed where a serious and imminent threat to a fair trial is shown.[21]

(iv) *Fifth Circuit on "closure" orders: the "bare possibility" test.*

The Fifth Circuit here adopted the least demanding standard of all by approving the trial judge's "bare

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[17]"The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trial.' A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors and the judicial process to extensive public scrutiny and criticism." *Sheppard v. Maxwell, supra,* 384 U.S. at 350.

[18]*Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 258 (1974).

[19]*United States v. Tijerina, supra* note 7; *Central South Carolina Chapter, etc. v. Martin, supra* note 5.

[20]The Solicitor General believes the Ninth Circuit has also adopted this test. See note 7, *supra.*

[21]*Chicago Council of Lawyers v. Bauer, supra note 6, CBS, Inc. v. Young, supra,* note 6.

possibility" test. This "standard" might more correctly be designated "no standard", since the trial judge stated there was *no* reason to believe the jury was violating his cautionary instructions and *no* reason to believe the press would publish sensational or misleading information about the trial.

2. *State Courts.*

Most reported state court decisions adopt a strict test of *necessity* for entry of a restrictive order generally in accordance with this Court's decision in *Nebraska Press Association.* There are two recent exceptions, one of which is the subject of a pending appeal to this Court and the other of which, Petitioners are advised, will also be the subject of a request for review by this Court.

(i) *Florida.* Ironically, Florida's state trial judges, in contrast to its federal trial judges, must apply a stringent test in considering "closure" orders, and such orders are strongly disfavored.[22] In contrast, "no comment" orders may be entered merely for "good cause".[23]

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[22]*Miami Herald Publishing Company v. Collazo,* 389 So.2d 333 (Fla. 3d Dist. Ct. App. 1976), *cert. denied,* 342 So.2d 1100, (sealing a portion of court files) *News-Press Pub. Co., Inc. v. State,* 345 So.2d 865 (Fla. 2d Dist. Ct. App. 1977); *cert denied,* ___ So.2d ___, No. 51,639 (November 14, 1977) (sealing deposition transcript), *State ex rel. Gore Newspapers Company v. Tyson,* 313 So.2d 777 (Fla. 4th Dist. Ct. App. 1976) (closing trial),*overruled on oth. gnds., English v. McCrary,* 348 So.2d 293 (Fla. 1977).

[23]*State ex. rel. Miami Herald Publishing Company v. McIntosh.* 340 So.2d 904, 910 (Fla. 1977).



(ii) *New Jersey.* New Jersey applies the "serious and imminent threat" test to "closure" orders, *State v. Allen, supra,* 373 A.2d at 383, but apparently authorizes "no comment" orders where reasonable. *Ibid.*

(iii) *Minnesota.* The Minnesota Supreme Court has adopted a test similar to Florida and New Jersey with respect to a trial judge's sealing of documents relating to a criminal prosecution, which it deems a prior restraint, and further requires a written order showing exhaustion of alternatives. *Northwest Publications Inc. v. Anderson,* ___ Minn. ___, 259 N.W.2d 254 (1977).

(iv) *New Hampshire.* New Hampshire recently adopted a standard prohibiting closure of pretrial hearings unless there is a "substantial likelihood" of prejudice which *cannot* be avoided by alternative means. *Keene Publishing Corp. v. Keene District Court,* ___ N.H. ___, ___ A.2d ___ No. 7953 (November 23, 1977). See also *Thomson v. Cash,* 117 N.H. ___, 377 A.2d 135 (1977).

(v) *Ohio.* The Ohio Supreme Court has determined that pre-trial hearings may be closed only on a *finding* that "publicity will create a clear and present danger of serious and imminent threat to the administration of justice . . ." *State ex rel Dayton Newspapers, Inc. v. Phillips,* 351 N.E.2d 129, 135 (1976).

(vi) *Pennsylvania.* The Pennsylvania Supreme Court held pretrial suppression hearings may be closed to press and public at the request of the defendant with no further showing. *Philadelphia Newspapers, Inc., etc., et al. v. Jerome, supra* note 8. This Court recently

vacated the Pennsylvania Supreme Court's decision and remanded the case for clarification of the basis for its decision.

(vii) *New York.* The New York Court of Appeals recently ruled that closure of a preliminary hearing of two youths accused of murder was permissible because this matter involved "mere curiosity" rather than "legitimate public interest." The court indicated a different rule could apply to trials such as the one here involved: "In trials involving public officials for instance, the public may have an overwhelming interest in keeping all proceedings open" for there "the public's concern . . . [would be] focused on prosecutorial or judicial accountability." *Gannett Co., Inc. v. De Pasquale,* ___ N.Y. ___, ___ N.E.2d ___, No. 549 (December 19 1977). Other than to create a presumption in favor of closed pre-trial hearings involving "mere curiosity", New York does not adopt any standard for application of the presumption.

(c) *The decision below raises the significant question of whether closure orders permissible under the "bare possibility" standard so substantially limit as to imperil the common law public rights of public trial and public records.*

(i) *The common law public right of access to a public trial.*

The Fifth Circuit's decision raises a serious question as to the continued existence of the common law public right to a public trial. The tradition of open



judicial proceedings has existed for centuries[24] and in the American colonies antedates our Revolution by more than 100 years.[25] Thirty years ago this Court reaffirmed the common law rule, holding: "A trial is a public event. What transpires in the courtroom is public property." (*Craig v. Harney,* 331 U.S. 367, 374 (1947)). Shortly thereafter this Court traced in most compelling terms the ancient Anglo-American distrust for secret trials and the traditional requirements that "every criminal trial [be] subject to contemporaneous review in the forum of public opinion" so as to be "an effective restraint on possible abuse of judicial process." *In re Oliver,* 333 U.S. 257, 268, 270 (1948). The right of public trial being an "immemorial right"[26], under the Ninth Amendment it was "retained by the people".

A public trial insures the public's right to know how justice is administered, which is of particular importance in prosecutions and trials claimed to be "political" (*United States v. Dickinson,* 465 F.2d 496, 501 [5th Cir. 1972]).[27] This public right transcends the

[24]See Lord Coke, Second Institutes, 103-104; Wigmore, *Evidence,* (3d Ed. 1940) §2250.

[25]See generally, *United Press Association v. Valente,* 308 N.Y. 71, 89-94, 123 N.E.2d 777, 786-788 (1954) (Frossel, J., dissenting); Heller, *The Sixth Amendment to the Constitution of the United States.* (1917), p. 155.

[26]*Radin, The Right to a Public Trial,* 6 Temple L. Quarterly 381-383 (1932).

[27]In this case not only was a former U.S. Senator on trial for claimed political corruption, but the claims of "political trial" and doubts about the judicial system's ability to cope with such an unprecedented matter also placed the Department of Justice and the entire system of justice on trial in the eyes of the public.

personal right of the criminal defendant to close a trial (e.g., *Lewis v. Peyton*, 352 F.2d 791 [4th Cir. 1965]). In fact, any proposed limitations on "the constitutional requirement of a public trial must be tested by a standard of *strict and inescapable necessity*". *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 607 (3rd Cir. 1969) (emphasis supplied).

Despite the Fifth Circuit's contrary belief, the centuries-old common law right of full public entry to judicial proceedings is fundamental to this case. The Fifth Circuit here endorsed a trial judge's unfettered discretion to close to press and public all those portions of a trial not submitted to a jury, and the trial judge's actions as effectively closed those portions as if he had locked the courtroom doors. Decisions made in bench conferences are as likely as those rendered in open court to constitute abuse of discretion, and may never be judicially reviewable.[28] Allowing the public to view only what is presented to a jury vitiates the public's role as monitors of those decisions and the judicial system itself. The result, at minimum, is public suspicion of the judicial process; the very presumption of fairness and integrity enjoyed by the judiciary is the product of the tradition of open judicial proceedings.

[28]Thus if a ruling on the admissibility of a confession or other evidentiary ruling should frustrate a prosecution (and thereby the public represented by the prosecutor), and the jury therefore acquit, no judicial review is possible. If a "no-comment" instruction is given trial participants during a bench conference (as was the case here), the trial judge's actions will never see light of day. See also App. 63.



(ii) *The common law public right of access to public records.*

The decision of the Fifth Circuit also violates the common law principle that judicial records are public records by permitting their closure without establishing a standard for so doing. See *United States v. Mitchell, supra.* The Fifth Circuit specifically held that "exhibits produced under subpoena and not yet admitted into evidence, . . . [were] not yet in the public domain" (558 F.2d at 1210), and sanctioned the trial judge's standardless limitations on access to admitted exhibits. *Cf. United States v. Mitchell, supra.*

That exhibits offered but rejected, exhibits identified or authenticated in open court but not yet admitted into evidence, written communications between the judge and jury once made court exhibits, and all other exhibits remanded to the custody of a court clerk are public records seems incontestable.[29] Once these docu-

[29]See Local Rule 12, General Rules of the Middle District of Florida. As noted by the District of Columbia Circuit in *United States v. Mitchell, supra,* Rule 10(a), Federal Appellate Rules requires that exhibits be part of the record on appeal and the Manual for the Clerks of the United States District Courts prepared by the Judicial Conference of the United States pursuant to its authority under 28 U.S.C. §457 (1970), classifies exhibits as "auxiliary case records". 9 Moore's Federal Practice ¶21.04[2], pp. 1613, 1614, construes Federal Appellate Rule 10(a), to the effect that the trial record includes all exhibits *offered* in the proceeding and notes the need to show in the transcript where exhibits were "identified, offered, and received or rejected". See also Federal Appellate Rules 11(a) and 11(b). In fact, this being a criminal case involving a member of Congress, all these exhibits are "records of continuing value". *Manual for the Clerks of the United States District Court,* Exhibit 2, (Ref. 1301.4) at p. 2 (1954).

ments became public records the clerk was required to make such documents available to press and public.[30]

[30]Cf. General Rule 16(a), Rules of the Middle District of Florida, which prohibit disclosure only of "information that is not part of the public records of the Court".



## II.

### THE DECISION BELOW RAISES THE SIGNIFICANT, RECURRING AND UNRESOLVED PROBLEM OF WHETHER ENTRY OF A CLOSURE ORDER MAY BE CONSIDERED WITHOUT PRIOR COMPLIANCE WITH PROCEDURES MEETING DUE PROCESS REQUIREMENTS.

The Fifth Circuit affirmed the trial judge's orders entered without notice to Petitioners and other interested parties and without hearing, despite the Fifth Circuit's concession that Petitioners were the *targets* of these orders. As targets Petitioners' substantial interests could not be eliminated without prior notice and an opportunity to be heard. *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175 (1968). Furthermore, failure to put the restrictive orders in writing or docket them prevented the target from even learning of their existence or scope until the trial was nearly over.

Recent studies and cases as to the procedural minimums constitutionally required prior to considerations of entry of closure orders all mandate notice to press and public and affording an opportunity to be heard,[31] although the same result could be reached

[31]See, e.g., Recommended Court Procedures to Accommodate Rights of Fair Trial and Free Press, adopted by American Bar Association, August, 1976; Standard 5.1(a); Draft Report, American Bar Association Legal Advisory Committee on Fair Trial and Free Press (August, 1977); *Northwest Publications v. Anderson. supra.*

through this Court's exercise of its supervisory power over the lower federal courts.[32]

Even the trial judge haltingly acknowledged that prior notice and hearing might well have tempered the orders' scope and effect. Closure orders entered without these procedural protections necessitate hurried, and normally fruitless, attempts to secure appellate review. As the Fifth Circuit noted, Petitioners sought expedited review of the trial judge's actions, once discovered, through petitions for writs of mandamus and prohibition, 558 F.2d at 1206, n. 4. These petitions were denied *after the trial was over.*[33] Certainly this is no real remedy. Fundamental due process certainly requires more, for where First Amendment rights are involved, they may not be restrained without prior provision of "strict procedural safeguards, . . . including immediate appellate review." *National Socialist Party of America v. Skokie,* ___ U.S. ___, 53 L.Ed.2d 96 (1977).

[32]See *Schiavo v. United States,* 504 F.2d 1 (3rd Cir. 1974) *(en banc) cert. den. sub nom Ditter v. Philadelphia Newspapers, Inc.,* 419 U.S. 1096 (1975).

[33]Cf. *Nebraska Press Association v. Stuart,* 423 U.S. 1329, 1329 (1975) (Blackman, Circuit Justice) ("In this sense [restraint upon the reporting of news by the media], delay itself is a final decision.")



## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

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Supreme Court, U. S.
FILED
JAN 16 1978
MICHAEL RODAK, JR., CLERK

in the

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1010

MIAMI HERALD PUBLISHING COMPANY, GENE MILLER, TIMES PUBLISHING COMPANY and ANGEL CASTILLO

*Petitioners,*

*v.*

THE HONORABLE BEN KRENTZMAN
United States District Court for
the Middle District of Florida

*Respondent.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[558 F.2d 1202]

UNITED STATES of America,
Plaintiff-Appellee,

v.

Edward J. GURNEY et al., Defendants,

Miami Herald Publishing Company
et al., Movant-Appellants.

No. 75-3338.

United States Court of Appeals,
Fifth Circuit.

Sept. 12, 1977.

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[558 F.2d 1204]

Appeals from the United States District Court for the Middle District of Florida.

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

Appellants, The Miami Herald Publishing Company (publisher of *The Miami Herald*), The Times Publishing Company (publisher of *The St. Petersburg Times*), Gene Miller, a reporter for *The Miami Herald*, and Angel Castillo, a reporter for *The St. Petersburg Times*, seek review of district court rulings [558 F.2d

1205] denying their requests to examine certain trial documents in a criminal proceeding.[1]

## I. BACKGROUND

The trial in the case of United States v. Edward J. Gurney, et al., began on February 25, 1975. The case involved an incumbent United States senator at the time of indictment and generated considerable public interest. The proceedings were the subject of extensive news coverage. Several accommodations were made by the trial judge for representatives of the news media. Provisions were made for a telephone room for wire service representatives, reserved seating was secured for the press, and convenient but inconspicuous seating was furnished to a newspaper sketch artist.

The district judge discussed jury management questions with counsel before the trial began. Sequestration was considered, but defense counsel chose not to request such action in view of other measures adopted to insulate the jury. The judge admonished the jurors daily not to discuss the case, not to read any newspapers other than those cleared by counsel and given to the jurors by the Clerk, and not to listen to or view broadcasts concerning the trial. The attorneys were informed that the district judge expected to grant appropriate requests to conduct some of the proceedings ancillary and preliminary to the reception of evidence out of the hearing of the public.

[1]The trial in question was the criminal trial of former Senator Edward J. Gurney and others. (United States v. Gurney, et al., Case No. 74-122-CR-J, in the United States District Court for the Middle District of Florida.)



After the trial got under way and the government began putting on its case in chief, consisting in large part of documentary proof, the appellant newsmen sought to inspect various documents and exhibits, some of which were in evidence and some of which were only identified. The Clerk refused access to many of these items pursuant to oral directions of the district judge. Appellants then filed their "Petition for Hearing and for Vacation of Restrictions on Press and Other News Media" directed to the district court's denial of access. In this petition, the newspapers and reporters asked the trial court to remove the restrictions on their access to: (1) exhibits offered at trial for identification but not yet admitted; (2) exhibits admitted but not yet read to the jury; (3) exhibits offered but rejected; (4) the transcript of the grand jury testimony of Senator Gurney; (5) the witness list; (6) names and addresses of the jurors; and (7) defense exhibit No. 79, a copy of a purported statement of a witness, Larry Williams, to the F.B.I., which had been received in evidence. The petitioners asked further that the judge vacate any prior rulings entered during the trial as to such matters and that he reduce to writing those rulings not vacated.

On July 1, 1975, after conducting a hearing, the district judge entered a written order permitting: (1) inspection of exhibit No. 79; (2) inspection of a list of witnesses; and (3) examination by petitioners of exhibits received in evidence, subject to the availability of the Court's trial clerk. He denied: (1) unlimited disclosure of Senator Gurney's grand jury testimony;[2] (2) dis-

[2]At the hearing, the judge stated that appellants could obtain transcripts from the court reporter of those portions of the grand jury testimony that had been read to the jury.

closure of the names and addresses of the jurors; (3) access to the bench conferences with counsel;[3] and (4) access to exhibits identified but not received into evidence.

On July 16, 1975, the district judge orally denied appellants' further request for access to the transcript of a proffer of testimony received by the judge in camera at a bench conference. On July 30, 1975, after the jury was sequestered during its deliberations, appellants asked for leave to inspect a written communication to the judge from [558 F.2d 1206] the jury. A similar request was made on July 31, as to a communication from the trial judge to the jury. The district court orally denied both requests.[4] Appellants seek reversal of the district court's rulings.[5]

[3]In their petition, appellants did not seek direct access to bench conferences as such. This matter developed during the hearing, inasmuch as proffers of government exhibits, defense objections thereto, and rulings thereon occurred in the main during sidebar conferences between court and counsel.

[4]Appellants sought expedited review of the district court's actions by a Petition for Writs of Mandamus and Prohibition filed in this court. This Petition was denied by an order entered August 13, 1975.



pellants seek reversal of the district court's rulings.[5]

Appellants' primary claim is that the district judge violated their First Amendment rights when he denied the press access to various exhibits and transcripts, the jury list, and the written communications between the judge and the jury. Also at issue is whether the district judge violated the First and Fifth Amendments by fail-

[5]In addition, appellants request that the trial judge be directed:

> 1. Not to issue any orders or establish any unwritten rules restricting the flow of information to or access of Appellant reporters or other members of the press to the Court record and proceedings in a criminal trial without first giving the press notice and a reasonable opportunity to be heard and reducing such order to writing and causing it to be docketed with the Clerk.
>
> 2. Not to hold 'bench conferences' with the jury excused to deny Appellant reporters or other members of the press and the public access to information as to the conduct of a public trial or to employ any other devices to the same purpose or effect.
>
> 3. To permit Appellant reporters and other members of the press to inspect and view transcripts of all testimony and proffered testimony or, if no transcript is available, afford them the opportunity to have a transcript prepared at the expense of the party requesting it.
>
> 4. To permit Appellant reporters and other members of the press to inspect and view all written communications between the Judge and the jury.
>
> 5. To permit Appellant reporters and other members of the press to inspect and view all exhibits that have been identified and placed in the custody of the Clerk as part of the record of the Court."

Appellants' Brief at 28-29.

ing to: (1) hold a hearing and (2) issue a "special order"[6] regarding each of the appellants' requests to view materials. After careful consideration of the issues presented, we find that the district court's actions did not violate appellants' First or Fifth Amendment rights. Thus, we affirm the district judge's rulings.

## II. JURISDICTION

[1,2] We must consider at the outset the jurisdictional questions of standing, finality, and mootness..

The appellee United States concedes that the reporters and their respective newspapers have standing to challenge the district court's decision regarding appellant's claimed right of access to the various trial documents. The appellants were the direct targets of the district court's rulings. The two requirements for establishing standing have been met—i.e. (1) there is a claim of injury in fact; and (2) the interest sought to be protected is arguably within the zone of interests to be

[6]Rule 16(C) of the General Rules of the Middle District of Florida deals with the use of special orders in widely publicized cases:

> C. Special Orders in Widely Publicized and Sensational Cases.
>
> In a widely publicized or sensational case, the Court on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.



protected or regulated by the statute or constitutional guarantee in question. Data Processing Service v. Camp, 397 U.S. 150, 153-54, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Appellants have arguably suffered an injury with respect to newsgathering. Moreover, the district court's determinations arguably affected appellants' rights under the First Amendment. See Columbia Broadcasting System, Inc. v. Young, 522 F.2d 234, 237-38 (6th Cir. 1975). We conclude that appellants' standing is established.

[3-5] The government contends that, although the July 1, 1975, written order was final and appealable, the three subsequent [558 F.2d 1207] oral rulings (July 16, 30 and 31) were not final orders, but merely incidental, non-reviewable regulations of trial management.

Title 28, U.S.Code §1291 provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . ." The desire for judicial economy and the avoidance of unnecessary piecemeal appeals underlie the final judgment rule. See C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure: Jurisdiction, §3911 (1976); 9 J. Moore, Federal Practice ¶110.07 (2d ed. 1975).

The "collateral order" doctrine established by the Supreme Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 60 S.Ct. 1221, 93 L.Ed. 1528 (1949), provides an expansive interpretation of the finality requirement. A "collateral order" is one which finally determines a claim of right "separable from, and collateral to, rights asserted" in the main cause of action. Cohen, supra, 337 U.S. at 546-47, 69 S.Ct. at 1225-1226. Four basic requirements generally must be

satisfied before a matter is reviewable under the collateral order doctrine.

First, the matter must have been finally disposed of by the district court. But, if there is a "plain prospect that the trial court may itself alter the challenged ruling, there is little justification for immediate appellate intrusion. It is enough that no further consideration is contemplated". Wright, Miller and Cooper, supra, §3911 at 470. Second, the matter reviewed must be "separable from, and collateral to, rights asserted in the action". Cohen, supra, 337 U.S. at 546-47, 69 S.Ct. at 1225-1226. Finally, if denial of review entails the risk of "irreparable injury", and the case involves "a serious and unsettled question", the appeal should be granted. See Wright, Miller and Cooper, supra, §3911 at 470-71; Moore, supra ¶110.10 at 133.

In view of the underlying purpose of the final judgment rule and the particular facts in this case, we believe that the district judge's four rulings in question had sufficient finality to permit appeal. Although the three oral rulings may have lacked procedural formality, the appeal can be justified in light of: (1) the improbability of further consideration by the trial court; (2) the close similarity of issues disposed of by the written order and the oral rulings; and (3) the general importance of the rights involved. Moreover, the questions presented here could affect many other cases. See Wright, Miller and Cooper, supra.

[6] Mootness presents the final procedural hurdle. Appellee concedes that the appeal here is not moot. We agree. Despite the conclusion of the Gurney trial, the specific issues presented by the appellants are of a continuing nature. A case such as this one presents a controversy "capable of repetition yet evading review", Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), because "the underlying criminal proceeding would almost always terminate before the appellate court hears the case". United States v. Schiavo, 504 F.2d 1, 5 (3rd Cir. 1974), cert. denied, 419 U.S. 1096, 95 S.Ct. 690, 42 L.Ed.2d 688. See also Nebraska Press Assn. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).



We proceed to the merits.

## III. FIRST AMENDMENT CLAIM

The critical issue in this case is whether the trial court's rulings violated appellants' First Amendment freedoms. The district judge denied appellants access to (1) exhibits not yet admitted into evidence; (2) transcripts of bench conferences held in camera; (3) written communications between the jury and the judge; (4) list of names and addresses of jurors; and (5) Mr. Gurney's grand jury testimony.

[7] The question of media First Amendment newsgathering rights in the face of court or government restrictions has been the subject of much discussion but remains largely unsettled.[7] It is clearly established, [558

[7]See e. g. Note, The Rights of the Public and the Press to Gather Information, 87 Harv.L.Rev. 1505 (1974); Comment, Newsgathering: Second-Class Right Among First Amendment Freedoms, 53 Texas L.Rev. 1440 (1975); Comment, The Right of the Press to Gather Information After Branzburg and Pell, 124 U.Pa.L.Rev. 166 (1975).

F.2d 1208] however, that "[a] trial is a public event". Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947). Members of the media are thus free to report whatever occurs in open court. Estes v. Texas, 381 U.S. 532, 541-42, 85 S.Ct. 1628, 1932, 14 L.Ed.2d 543 (1965); United States v. Dickinson, 465 F.2d 496, 509 (5th Cir. 1972).

[8] The First Amendment guarantees "special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a 'previous' or 'prior' restraint on speech". Nebraska Press Assn. v. Stuart, supra, 427 U.S. at 556, 96 S.Ct. at 2801, 49 L.Ed.2d 683. Generally, orders proscribing publication of matters transpiring in open court are constitutionally infirm, absent some compelling justification. Id.; Columbia Broadcasting System, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); United States v. Columbia Broadcasting System, Inc., 497 F.2d 102 (5th Cir. 1974). But the trial judge here did not resort to the use of prior restraints despite the case being much publicized. "A prior restraint . . . by definition, has an immediate and irreversible sanction". Nebraska Press Assn., supra, 427 U.S. at 559, 96 S.Ct. at 2803. No such restriction "freezing", id., speech was imposed. The district judge merely refused to allow the appellants to inspect documents not a matter of public record. Appellants were free to obtain whatever infor-



mation they desired from any source except from the district court and its supporting personnel.[8]

[9, 10] The Supreme Court has recognized that newsgathering warrants some degree of First Amendment protection "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated". Branzburg v. Hayes, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656, 33 L.Ed2d 626 (1972). The extent of such protection has remained uncertain, but it is clear that it is not

[8]Alternative sources of information were available to appellants: the parties, the witnesses, the attorneys and members of the public generally. Appellants' attempt to analogize the instant case to Columbia Broadcasting System, Inc. v. Young, text, supra, fails. In Young CBS sought mandamus from the Sixth Circuit against the judge (District Judge Don J. Young) who was about to try a number of civil cases arising from the Kent State shootings on the campus of that University on May 4, 1970. There was widespread attendant publicity, and Judge Young had entered a "gag" order restraining everyone remotely concerned with the cases, including counsel, parties, court personnel, relatives, friends and associates, from discussing the cases with the media or members of the public. Of course no such sweeping order is involved here.

without bounds. "The right to speak and publish does not carry with it the unrestrained right to gather information." Zemel v. Rusk, 381 U.S. 1, 17, 85 S.Ct. 1271, 1281, 14 L.Ed.2d 179 (1965). The First Amendment right to gather news has been defined in terms of information available to the public generally.[9] See Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); Branzburg, supra; Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977) [decided August 3, 1977].

The press cannot be denied access to any information already within the public domain. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). Yet,

> "[t]he Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally . . . It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources . . . and that government cannot restrain the [558 F.2d 1209] publication of news emanating from such sources. . . . It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court". (citations omitted).

[9]"When representatives of the communications media attend trials they have no greater rights than other members of the public". Estes v. Texas, 381 U.S. 532, 584, 85 S.Ct. 1628, 1654, 14 L.Ed.2d 543 (1965) (Warren, J., concurring).



Pell, supra, 417 U.S. at 834-35, 94 S.Ct. at 2810. In Pell, the Court found that the press was not denied access to sources of information available to the public, and therefore, no violation of First Amendment rights occurred.[10] Id. The Supreme Court has suggested that, if there are other important interests to be protected in judicial proceedings, such protection may be accomplished "by means which avoid public documentation . . . " Cox Broadcasting Corp., supra, 420 U.S. at 496, 95 S.Ct. at 1047.

[11] The documents sought by appellants were not part of the public record.[11]In keeping with present Supreme Court guidelines, we do not think that the press had any First Amendment right of access to those matters not available to the public. See Garrett v. Estelle, supra.

There are many areas to which the public, and accordingly the press, traditionally have had no right of

[10]It appears that the logical extension of the media's right of access analysis is to determine what right of access the public has. The public right of access, however, has yet to be defined by the Supreme Court. Such a broad determination is not required by the limited questions presented for review here.

It is interesting to note, however, that in recent years rights of public access to government information have been established through legislative action, on the federal level for instance by 5 U.S.C. §552, The Freedom of Information Act (as Amended 1974). This statute has served as the model for similar legislation by many of the states.

[11]Appellants complain that their access to exhibits which were part of the public record was also unconstitutionally restricted. The trial judge permitted such access, but it was conditioned on his Court Clerk's availability. The reasonableness of this action is discussed infra, Note 13 and accompanying text.

access. Denials of access to such proceedings are generally based upon fundamental governmental interests and protections of other rights which override the concerns of the public. For example, the press and the public have historically been excluded from sensitive governmental activities such as grand jury proceedings, judicial conferences, see Branzburg, supra, 408 U.S. at 684, 92 S.Ct. at 2658, and in camera inspections of evidence. See United States v. Nixon, 418 U.S. 683, 714, 94 S.Ct. 3090, 3110-3111, 41 L.Ed.2d 1039 (1974). Admittedly, such denials of access hamper newsgathering. Any burdens, however, are generally incidental in view of the strong governmental interests involved.

The right of access to criminal proceedings becomes a highly controversial issue when First Amendment questions must be analyzed in conjunction with competing Sixth Amendment considerations. "A heavy obligation rests on trial judges to effectuate the fair-trial guarantee of the Sixth Amendment". United States v. Columbia Broadcasting System, Inc., 497 F.2d 102, 104 (5th Cir. 1974). "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). In a widely publicized case, "the right of the accused to trial by an impartial jury can be seriously threatened by the conduct of the news media prior to and during trial". Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 394 (1968).



[12, 13] Thus, it is the trial judge's primary responsibility to govern judicial proceedings so as to ensure that the accused receives a fair, orderly trial comporting with fundamental due process. The trial judge is therefore granted broad discretion in ordering the daily activities of his court. [558 F.2d 1210] Id. at 401. "[A] trial judge should have the authority to adopt reasonable measures to avoid injury to the parties by reason of prejudicial or inflammatory publicity". Columbia Broadcasting System, Inc. v. Young, supra, 522 F.2d at 241. See also, United States v. Schiavo, supra, 504 F.2d at 6; United States v. Columbia Broadcasting System, Inc., supra, 497 F.2d at 106-07. Within this discretion, therefore, the district judge can place restrictions on parties, jurors, lawyers, and others involved with the proceedings despite the fact that such restrictions might affect First Amendment considerations. Sixth Amendment rights of the accused must be protected always. United States v. Columbia Broadcasting System, Inc., supra; United States v. Schiavo, supra.

[14, 15] The trial judge in this case did not abuse his discretion in imposing the challenged restrictions on press access to documents. The refusal to direct that the names and addresses of the jurors be publicly released[12] was well within the bounds of such discretion. See "Free

[12]During the jury selection process, the names of the persons selected and other jurors being examined were called in open court. The district court imposed no restriction on publication of the names called in open court. But the judge was following a well-established practice when he refused to publicly release the jury list, which included the names, addresses, and other personal information about the jurors. Such protection of the privacy of the jurors was clearly permissible, and certainly appropriate in a trial which attracted public attention as this one did.

Press-Fair Trial", supra, 45 F.R.D. at 410. Similarly, the trial judge had the duty of determining which exhibits were entitled to come into evidence. The press has no right of access to exhibits produced under subpoena and not yet admitted into evidence, hence not yet in the public domain. When exhibits were received into evidence and the subject of scrutiny by press and public it was reasonable for the court to condition their examination by the press upon the Clerk's availability.[13]

[16] Bench conferences between judge and counsel outside of public hearing are an established practice, "Free Press-Fair Trial", supra, 45 F.R.D. at 403, and protection of their privacy is generally within the court's discretion.[14] No abuse of discretion with respect to the conduct of the bench conferences is demonstrated by the appellants. Such conferences are an integral part of the internal management of a trial, and screening them from access by the press is well within a trial judge's broad discretion.

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[13]In the hearing held on appellants' Petition, the district judge pointed to his trial Clerk's other taxing duties and the large number of exhibits involved as the basis for this restriction. There were several hundred exhibits in this case. The Clerk must account strictly for all exhibits in his safekeeping. Thus, it is of utmost importance for him to maintain them in systematic order, available when called for by court or counsel. These factors made it necessary to limit examination by the press to such times as the Clerk was available.

[14]"It is elementary that in camera inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought." United States v. Nixon, supra, 418 U.S. at 714, 94 S.Ct. at 3110-3111.



[17] The district judge committed no error in denying access by appellants to Senator Gurney's grand jury testimony, and to the written communications between the judge and the jury. Gurney's grand jury testimony was not read to the jury in its entirety. The portion not published remained under the cloak of secrecy imposed by Rule 6(e), F.R. Crim.P. The judge permitted the appellant newsmen to obtain a transcript of that portion of the testimony read to the jury. It was proper to refuse to require the Clerk to blank out the unread portions of the grand jury testimony and deliver the transcript so excised to the news media.

[18] The press clearly has no constitutional right of access to the written communications between judge and jury. Compelling governmental interest in the integrity of jury deliberation requires that the priva[558 F.2d 1211]cy of such deliberations and communications dealing with them be preserved. Confidentiality is a shield against external considerations entering into the deliberative process. Such a shield prevents undermining of the integrity of the jury system. Juries must be permitted to deliberate fully and freely, unhampered by the pressures and extraneous influences which could result from access by the press to the deliberative process.

[19] The First Amendment does not protect against whatever incidental burdens on newsgathering occurred in this case. The trial judge employed reasonable "remedial measures", far short of prior restraints, to prevent possible prejudice and maintain an orderly trial. See Sheppard, supra, 384 U.S. at 362, 86 S.Ct. at 1522. The appellants were in no way prevented from investigating the other available sources to obtain the desired information. The district court's rulings denying

press access implemented a legitimate governmental interest in securing for the accused the fair trial guaranteed them by the Sixth Amendment. The court's actions bore a reasonable relation to the achievement of that purpose.

[20, 21] Finally, we find no error in the district court's failure to hold hearings and issue special orders regarding the appellants' requests for information. The oral rulings of the district judge specifically stated what was being withheld from the appellants. At the June 20, 1975, hearing and in his written order, the trial judge sufficiently explained his reasons for denying appellants access to documents. The subsequent requests were substantively identical to the requests considered at the June 30, 1975 hearing, and disposed of in the July 1 order. The terms of the orders and the reasons therefore were clearly stated.[15]

For the foregoing reasons, the district court's rulings appealed from are each AFFIRMED.

[15]Appellants rely on United States v. Schiavo, supra, to establish the requirement to hold hearings and issue special orders. In that case, however, the oral order: (1) gave no indication of the reasons for the order; and (2) failed to state specifically what conduct was being restrained. No such deficiencies are present here.

Moreover, it is unreasonable to require a district judge to hold hearings and to issue special orders with respect to every request he is presented with by the press during the course of a long trial. The later requests here were oral and informal. The judge responded in kind. It is the trial court's responsibility to decide which documents will be placed in the public domain, and which are entitled to privacy and confidentiality. These decisions are discretionary, numerous, and form an integral part of trial management. The efficient administration of the trial courts would be significantly impaired should we require hearings and special orders for each such decision.



United States Court of Appeals
For the Fifth Circuit

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No. 75-3338

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D. C. Docket No. 74-122-CR-J
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDWARD J. GURNEY, ET AL.,
Defendants,

MIAMI HERALD PUBLISHING COMPANY, ET AL.,
Movant-Appellants.

Appeals from the United States District Court
for the Middle District of Florida
Before GEWIN, AINSWORTH and SIMPSON,
Circuit Judges.

**JUDGMENT**

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that movant-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

September 12, 1977

Issued as Mandate: OCT 26 1977



United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
October 18, 1977

TO ALL PARTIES LISTED BELOW:

NO. 75-3338 —
U.S.A. v. EDWARD J. GURNEY, MIAMI HERALD PUBLISHING CO.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By Brenda M. Hauck
Deputy Clerk

**on behalf of appellants, Miami Herald Publishing Co.,

[1]

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

Case No. 74-122-Cr-JK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EDWARD J. GURNEY, JAMES L. GROOT,
EARL M. CRITTENDEN, GEORGE ANDERSON,
JOSEPH BASTIEN, WAYNE SWIGER,
and RALPH M. KOONTZ,
Defendants.

**PETITION OF THE MIAMI HERALD PUBLISHING COMPANY, THE TIMES PUBLISHING COMPANY, GENE MILLER AND ANGEL CASTILLO FOR HEARING AND FOR VACATION OF RESTRICTIONS ON PRESS, AND OTHER NEWS MEDIA**

1. Petitioners are the following Florida newspapers and reporters:

(a) The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc., publisher of the Miami Herald.

(b) The Times Publishing Company, publisher of the St. Petersburg Times.



(c) Gene Miller, Miami Herald.

(d) Angel Castillo, St. Petersburg Times.

2. At the commencement of the trial in this action, this Court orally directed the Clerk to provide access only to attorneys with respect to exhibits marked for identification, exhibits admitted but not yet read to the jury and written documents read into the record and to deny access thereto to the press, including Petitioners, and the public.

3. Pursuant to this oral direction and subsequent oral directions of this Court, the Clerk refused to permit Petitioners access to:

[2] (a) The transcript of the grand jury testimony of Defendant Edward J. Gurney after the reading of such testimony in open court.

(b) Defense Exhibit No. 79, a copy of a purported statement of a witness, Larry Williams, to the Federal Bureau of Investigation, after being marked for identification but prior to it being identified in open court.

(c) Defense Exhibit No. 79 after it had been identified by a witness and admitted into evidence but prior to its being read to the jury.

(d) The list of all witnesses to be called in this case, although such witness list had been read in open court.

(e) The jury list after selection of the jury.

4. This case is one of manifest public interest and concern. Petitioners have written and published articles concerning this proceeding since its commencement and Petitioners' reporters have attended the trial from initial selection of the jury until this date.

5. This Court has instructed all jurors not to discuss the case, not to read any newspapers, and not to listen to or view any broadcast with respect to the trial and there is no reason to believe the jurors are not complying with these instructions.

6. In connection with the prosecution's case, the entire grand jury testimony of Defendant Edward J. Gurney was read to the jury and is part of the record of this case. In order that their articles with respect to this testimony be as accurate as possible and in connection with subsequent articles dealing with testimony in the case which might be confirmatory of or in contradiction to such grand jury testimony, Petitioners have requested that the grand jury testimony as read to the jury be furnished to them for inspection. The Clerk denied Petitioners access to such grand jury testimony, stating the transcript of the testimony had been sealed and Petitioners could not have access thereto.

[3] 7. During cross examination of prosecution witness Larry Williams, Defense Exhibit #79, purporting to be a copy of a transcript of witness Williams' statement to the Federal Bureau of Investigation, was marked for identification, but not admitted at that time into evidence. On request by Petitioners to view this document, the clerk denied Petitioners access thereto,



and ordered the Clerk not to permit Petitioners to see such document until introduced into evidence in this case.

8. On June 25, 1975, Defense Exhibit 79 was identified by defense witness Diane Nerheim and admitted into evidence. Again Petitioners asked to view the exhibits and again the Clerk denied Petitioners' request, this time stating the Court had ordered the Clerk not to permit Petitioners access thereto unless such exhibit is read to the jury.

9. During the trial the list of all proposed witnesses was read in open court and is thus part of the record in this case. Although part of the record, the Clerk at the direction of the Court has denied Petitioners access thereto.

10. On June 13, 1975, Petitioner Miller requested access to the names of the jurors, their addresses and the amount of money paid to them to that date for jury service for preparation of an article. Although the names and addresses of such jurors are part of the record in this case, the Clerk denied Petitioner Miller access to this information. The Clerk also refused to provide Petitioner Miller with any information as to compensation of individual jurors.

11. All the foregoing directions were entered without giving prior notice or opportunity to be heard to Petitioners or any other representatives of the press. Therefore the entry of each of these directions denied Petitioners due process of law, [4] violated the freedom of press guarantee of the First Amendment to the Constitution of the United States, and violated the

procedural requirements of the Federal Rules of Criminal Procedure.

12. Each of these directions prevents Petitioners from reporting matters of substantial public interest and concern and denies the public its right to be informed as to such matters and therefore also denies due process of law and violates the freedom of the press guarantee of the First Amendment of the Constitution of the United States.

WHEREFORE, Petitioners pray that this Court:

1. Hold a hearing on short notice with respect to amendment of all directions of this Court described herein.

2. Amend all directions of this Court:

(a) restricting access by Petitioners to any exhibit offered at this trial for identification, any exhibit identified but not yet admitted, and any exhibit admitted but not yet read to the jury.

(b) restricting access by Petitioners to written documents which have been read into the record in this case, including without limitation,

(i) the grand jury testimony of Edward J. Gurney;

(ii) the witness list of prosecution and defense witnesses;



(iii) the names and addresses of jurors.

(c) otherwise restricting access to written materials which become part of the record in this case or otherwise become public records.

so as to eliminate all such restrictions.

[5] 3. Reduce to writing and have entered in the docket book of this Court any directions or orders relating to the matters set forth in this Petition.

4. Grant such further relief to Petitioners as may be appropriate.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was delivered by hand this 27th day of June, 1975 upon all counsel of record.

Parker D. Thomson



BRACKETED NUMBERS INDICATE PAGE OF TRANSCRIPT

[1] IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NO. 74-122-CR-J

UNITED STATES OF AMERICA,

-vs-

EDWARD J. GURNEY, JAMES L. GROOT,
EARL M. CRITTENDEN, GEORGE ANDERSON,
JOSEPH BASTIEN, WAYNE SWIGER, and
RALPH M. KOONTZ.

30 June 1975

At Tampa, Florida

Before HON. BEN KRENTZMAN, Judge

**[EXCERPTS FROM]**
**REPORT OF HEARING IN RE**

**PETITION OF THE**
**MIAMI HERALD PUBLISHING COMPANY,**
**THE TIMES PUBLISHING COMPANY,**
**THE TRIBUNE COMPANY, GENE MILLER, AND**
**ANGEL CASTILLO FOR HEARING**
**AND FOR VACATION OF**
**RESTRICTIONS ON PRESS AND OTHER**
**NEWS MEDIA.**

EDWARD R. MACK, Official Reporter
326 Post Office Building
Tampa, Florida 33601

[3] THE COURT: Having practiced before the Bar approximately — well, wait just a minute and we will be ready to proceed with your matter.

MR. THOMSON: Your Honor, just for clarification, Mr. Miller has been under the impression — not directly given by the Court — that he was to deal with your Court through Mr. Gilbert; and at least in two or maybe three of these instances a direct question was placed to Mr. Gilbert; and at least one time Mr. Miller said, "Mr. Gilbert, is that your decision or is that Judge Krentzman's decision?"

And Mr. Gilbert went to speak to you and returned and said, "That is the Judge's decision."

[16] THE COURT: That is exactly — I don't know about him asking Mr. Miller; but Mr. Gilbert asked me; and what Mr. Gilbert has said is what I told him.

MR. THOMSON: I assumed that to be correct.

* * *

THE COURT: . . . What the Clerk says and does — when he says something he speaks for me. All right.

And the reason he does is because he speaks to me first, which is important. So that is correct. We have got that point solved.

Now with regard to Item (a) "The transcript of the Grand Jury testimony", you suggest somewhere that it was read — all read to the jury.

The fact is that is was not all read to the[17] jury.



The fact is that some of the defendants raised objections under what you will understand are Bruton questions.

They were fully discussed in the absence of the press.

After that ruling the rest of it was read to the jury.

So the transcript itself — as a matter of fact, that portion of it which was not read to the jury and publicized has never been removed from the proscription of Rule 6, which prohibits it from being publicized. But I don't stand behind that.

It will stand along with all of the other matters that were not read to the jury which I have precluded from delivery to the press.

* * *

[18] Now I have never precluded — that I know of — the press from getting from the Court Reporter a copy of anything that was read to the jury or that happened here; except any reference to a matter which occurred in the absence — occurred at the bench; or any matter relating to matters which I have received in camera.

But any matter which was read to the jury, the Court Reporter has been under the instruction —

Mr. Reporter, haven't you from time to time furnished the press with some portions? When they requested it?

THE REPORTER: Not of the Grand Jury testimony. . . .

* * *

[19] . . . MR. MANRY: Your Honor, could I ask a question of the Court Reporter?

THE COURT: Yes.

MR. MANRY: Mr. Mack, in reporting the portion of the Grand Jury minutes that were read in testimony, did you take down verbatim what was read or did you merely note the page and line numbers that were read in the existing transcript?

THE REPORTER: I made an electronic recording [20] of it.

* * *

[22] . . . MR. THOMSON: . . . There are several [exhibits] that have been identified but not yet admitted.

THE COURT: A great many. And I have not [23] allowed any of them to be delivered to or examined by the press.

* * *

[29] . . . THE COURT . . . We could talk about, as the other cases do, the question of sequestration. I discussed that with counsel.

That is a hard question for a lawyer to ask — to decide; because nobody knows the real effect of sequestration on a juror.

They have their opinions. And I am not going into the reasons they gave for the opinion, but the defendants did not want the jury sequestered. . . .

* * *



[30] . . . And it is going to be my intent and purpose to preserve these jurors from any — as best I can, without precluding it — and by saying that I have not entered an order that you cannot write their names — and I say this. I congratulated the press, by the way, and thanked them — when I asked them not to publish their names and they didn't, I thanked them.

* * *

[32] MR. THOMSON . . . There were a couple of matters in that regard that I would like to seek clarification on.

I would like to observe that this petition did not suggest, nor are any of the petitioners — it is not their province to suggest that the jury [33] should be sequestered. In fact the observation in this petition was that the Court has regularly issued special instructions to the jurors not to read — and, as far as anybody in the press knows, they are complying with those instructions.

THE COURT: Let me say this. As far as anybody else knows, they are; and it is all believed by everybody that they are.

I would suggest - - another thing you may not know — and the Clerk can tell me: There are, as Court's Exhibits in this case, a good many copies of newspaper reports. . . .

* * *

[34] . . . Did you know — I don't know whether you people know or not — that we are providing newspapers to the jury.

We are providing a copy of — no offense — I am not sure they get a copy of the Miami Herald because none of them live in that area. But they do get a copy of the St. Pete Times and a Tampa Tribune and, I think, the Sarasota papers. . . .

THE COURT: Which the parties meet every morning and cut out — matters. So those articles have been removed.

But we do think they ought to be allowed to keep up with the current events.

So they get copies of the newspapers every morning, and during the recesses they can read the papers.

* * *

[38] THE COURT . . . If, to preserve a fair trial in this Courtroom, I have to stop and enter a written Order every time I do it — if somebody tells me I have to do it, I will do it, but not until.

And I am not going to have a hearing and give a due process hearing to the press before I do it.

* * *

[41] THE COURT . . . "Having assigned almost all of the available seats in the courtroom to the news media the [42] judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial".

That is what he says happened in Sheppard.

It has not happened in this case.

The newsmen have been perfect gentlemen. They have cooperated, and I don't suggest that. I want to make that clear.

* * *



[45] MR. THOMSON: Your Honor has said that you do not intend to issue written orders in these matters and to hold hearings on this type of matter unless instructed to do so, in effect.

THE COURT: What I have said is that I did not think it was necessary in this case, and I had no idea it would be necessary, and nobody has suggested it was necessary until this petition was filed.

I have said that in the future I may do that because I learn from experience.

* * *

[51] THE COURT: But my point is that nobody has ever asked for an Order before and I have not felt the need for an order.

We haven't had any — I guess, as far as I know, I don't know what goes on in people's minds; but I thought everybody was fairly happy.

* * *

[56] MR. THOMSON: Then the issue of defense Exhibit No. 79 before it was admitted is not at issue as such; but the issue of exhibits offered for evidence but not yet received in evidence is an issue before this Court.

THE COURT: I am not going to let you see [57] them in this case.

MR. THOMSON: . . . the Clerk should disclose those exhibits to the press.

THE COURT: Maybe he should but I am telling him not to do it.

I have told him not to do it. I tell him not to do it. I am telling him not to do it in the [58] future.

For this reason — for two reasons. I hope that the jury is not reading what is in the newspapers. I don't think they are. But there is always that bare possibility.

The very fact that they have been rejected in this case — this is a well prepared case. I mean the press is doing actually a remarkable job.

I have come to a renewed appreciation for investigative journalism.

* * *

[60] MR. THOMSON: Your Honor, with respect first to the specific issue of identified exhibits or exhibits offered into evidence but rejected; to my mind, Your Honor, it is no different than a proffer that may come in out of the presence of the jury in open Court. And Courts have regularly held that this is publishable under the First Amendment.

THE COURT: All right, just a moment. Excuse me.

[61] Interestingly enough, you ought to add to your list the fact that I have Bench Conferences here, and so those proffers don't come in publicly.

They are on the record.

MR. THOMSON: Well Bench Conferences being what they are, we don't know what goes on at Bench Conferences.

THE COURT: That's right. Well then, you ought to add that to your list of things that I do. I have a lot of them.



. . . MR. THOMSON: Well the fact is that the assumption is that the newspapers are not being read on this issue by the jury. The jurors have been [62] instructed.

THE COURT: That is an assumption which I hope is true, but it is not — you don't know whether they are or not — do you?

MR. THOMSON: . . . And the defense apparently in no way wants to prevent them from reading the newspapers as such because it does not desire to sequester the jury. It obviously does not want them to read the newspapers; but it does not recommend to the Court the one thing that would clearly stop them from reading the newspapers; which is to sequester the jury.

THE COURT: Well, I think they came close. They made a decision after I had told them what I was going to do.

And in reliance — knowing me and the way I conduct a trial, and counting on me to preserve a fair trial.

Now I am not sure they would have said that with some — they certainly would not with the Judge who was going to conduct the Sheppard trial.

* * *

[68] . . . MR. THOMSON: The final element, Your Honor, [69] is the Grand Jury testimony of Senator Gurney, which could be taken in any form that protects the portions of it that were not admitted in evidence.

* * *

THE COURT: The only way you are going to get that is to get the transcript from the Court Reporter.

MR. THOMSON: Well may I ask the Court Reporter: If one were ordered how fast could we get it?

THE REPORTER: By being able to xerox part of it, I could probably get it to you in a week to ten days.

THE COURT: Well you are not going to be able to do what the Clerk cannot do.

Here is the point. There may be some dispute about it.

I had a copy that is marked.

[70] The person who was reading it had a copy and the person who was answering had a copy, and the defendants had a copy.

I don't think there was any inadvertent slip in something and went to the jury that shouldn't have gone; but the idea — I am not going to rely — when this matter — if it ever goes up and there is an appeal, the thing that all the parties will rely on and that everybody else will rely on is the transcript that this Reporter prepares. And that is the only thing that is ever going to be furnished to the newspapers as far as I am concerned.

Now if you want to get one, you can, and thats it.

THE REPORTER: Let me intrude this explanation, Judge.



Tomorrow I have to start delivering daily copy in the Gurney case which will consume my time far into the night for a long time; and if I have to screen every syllable of that transcript that was read, it would be a matter of weeks.

THE COURT: Well it wouldn't have been as long if you had started earlier. But, at any rate, thats it.

* * *

[71] MR. THOMSON: The result of what the Court has ruled on this effectively means, from what the Court Reporter has said, that the Grand Jury testimony cannot be gotten until the trial is probably going to be over with.

So it becomes of interest historically or [72] not at all.

THE COURT: Well, if thats the way it is, thats the way it is. . . .

* * *

[73] THE COURT . . . The jury is not going to ever have that transcript.

Why should the press or the public or anybody else?

MR. THOMSON: And that apparently is not possible —

THE COURT: And I guess if the press wants it, and the Court Reporter has time, he will read it to them.

[87] THE COURT . . . And, Mr. Castillo, you are not going to be allowed to look at all the exhibits [88] received in evidence but not read to the jury.

And if that be trespass as the First Amendment, so be it, that is in this case. That is what I am going to do.

* * *

[99] CERTIFICATE OF REPORTER

I HEREBY CERTIFY that the foregoing is a correct and complete report of the proceedings detailed therein, reported by me personally and transcribed under my supervision.

EDWARD R. MACK
Official Reporter



IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 74-122 Cr. J-K

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EDWARD J. GURNEY, et al,
Defendants.

**ORDER**

On June 27, 1975 the Miami Herald Publishing Company and others filed a petition for hearing and for vacation of restrictions on press and other news media, supported by a memoranda. On that date the Court scheduled a hearing on said petition for June 30, 1975 at 10:00 A.M.

Petitioners presented evidence, the Court received and made stipulations as to facts, heard argument of counsel, and has fully considered the same.

The proceedings were reported, are available for transcription, and the parties stipulated that the findings made by the Court and the reasons therefor could and should be considered a part of this order.

Under the circumstances described at hearing the Court confirmed that prior to this time there has been no written order such as authorized, but not required, by Rule 16(C) of the local rules of this Court, with respect to the matters raised by the petition. The Court has from time to time, as the need arose, issued instructions either to the Clerk of this Court, to the courtroom bailiff, or directly to those persons involved in the courtroom and on the record.

For the reasons given at hearing, the names and addresses of jurors are and have been kept confidential both before and after the impaneling thereof excepting only that counsel for the respective parties are allowed the use of same during the voir dire proceedings. This, of course, would not apply in the case in which a defendant is charged with a capital offense.

The request for disclosure of the transcript of the grand jury testimony of defendant Gurney was, and is DENIED. Although the majority of said transcript was read to the jury in open court, objections to some portions were sustained, and the transcript as such was not received as an exhibit. The prohibition against disclosure of portions not prohibited to the jury, contained in Rule 6, Federal Rules of Criminal Procedure, has not been waived and is not waived.

Defense Exhibit No. 79, which was identified sometime ago, and the disclosure of which has been prohibited, was admitted in evidence on June 25, 1975. Its disclosure to petitioners was authorized at the hearing.



Just prior to the time the jury was selected the plaintiff submitted partial lists of witnesses whom they expected to be called to testify. Those lists, together with additional names orally submitted to the Court by counsel, were included in the Court's initial instruction to the jury panel. That instruction had not been filed with the Clerk but was given by the Judge in open court. At hearing the relevant portion of instruction was produced for inspection by petitioners.

At hearing the Court confirmed that exhibits received in evidence could be examined by petitioners subject to the availability of the Clerk. The Court further confirmed that exhibits identified, not received in evidence, would not be disclosed.

At hearing the Court confirmed, as it has been obvious to all in the courtroom during the trial, that it had, and will, from time to time, conduct bench conferences with counsel during the trial, which are outside the hearing of representatives of petitioners.

At hearing no one suggested that the Court had ever cited any member of the press for contempt or suggested that it intended to do so, or that the Court had ever directed petitioners or its representatives not to publish anything, or had ever prohibited petitioners or its representatives from obtaining from the court reporter, at their expense, any transcript of matters actually published to the jury.

IT IS SO ORDERED at Tampa, Florida, this 1st day of July, 1975.

/s/ Ben Krentzman
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

CASE NO. 74-122-CR-J

UNITED STATES OF AMERICA,

vs.

EDWARD J. GURNEY, JAMES L. GROOT, EARL M. CRITTENDEN, GEORGE ANDERSON, JOSEPH BASTIEN, WAYNE SWIGER and RALPH M. KOONTZ.

**AFFIDAVIT OF GENE MILLER**

STATE OF FLORIDA )
) SS:
COUNTY OF HILLSBOROUGH )

Gene Miller, being duly sworn, hereby deposes and says:

1. I am a reporter for The Miami Herald, assigned to cover the trial in this matter since its commencement. I have been in daily attendance at the trial. I have personal knowledge of the matters set forth herein.

2. On July 16, 1975 Defendant Ralph M. Koontz ("Koontz") testified. In the presence of the jury Koontz was asked a question by counsel for Defendant Edward J. Gurney. The question was:

> "Prior to the time that you were indicted, did the United States attorney tell you that it would not indict you if you changed your testimony and said that you heard Forrest Howell talk to Sen. Gurney?"

The prosecutor objected to the question and requested that the jury be excused. The jury was excused.

3. After the jury was excused Judge Krentzman called all attorneys to the bench, heard the objection in private, and Koontz then gave what the judge later identified as a proffer of testimony in private extending for a period of some 26 minutes. Neither the bench conference nor the proffer of testimony could be heard by myself, other reporters, or the public.

[63] 4. The jury was then called back, the question was reread by the court reporter, and Koontz replied, "No".

5. Immediately thereafter I, together with a reporter for the St. Petersburg Times, requested the court reporter to read a transcript of the proffer. The court reporter discussed the request with Judge Krentzman in chambers, returned and stated to me:

> "[Judge Krentzman] said that was a proffer and not testimony, and the answer about the transcript is negative."

6. The defense rested on July 16, 1975. The jury was then excused and Judge Krentzman stated from the bench to myself and the other reporters:



> "Those matters were proferred outside the presence of the jury, and I've directed the court reporter to seal them. You will not be able to get that."

7. Attached as Exhibits A and B are copies of articles published in The Miami Herald and the St. Petersburg Times on July 17, 1975. These articles accurately describe what occurred on July 16, 1975.

8. On July 17, 1975 the prosecution rested and all testimony in the case was completed.

9. Since July 21, 1975 the jury in this case has been sequestered.

10. On July 30, 1975 the jury delivered to the United States Marshal a single yellow sheet of paper. This paper was delivered to Judge Krentzman. Judge Krentzman then summoned all attorneys to a bench conference which lasted 38 minutes. Although the jury was not present, the conference was conducted in such a manner as to be inaudible to affiant, other reporters and the public.

11. After a 19 minute recess during which a written response to the apparent jury question was prepared, Judge Krentzman again summoned all attorneys to a bench conference. Although the jury was not present, the conference was conducted in such a manner as to be inaudible to affiant, other reporters and the public.

12. The sheet from the jury was admitted as a court exhibit. Affiant and other reporters requested that

they be allowed to inspect it. The Clerk refused to produce the sheet, stating that the judge had instructed him to so refuse.

13. Attached as Exhibit C is a copy of an article published in The Miami Herald on July 31, 1975. The article accurately describes what occurred on July 30, 1975.

/s/ Gene Miller
Gene Miller

SWORN TO and SUBSCRIBED before me this 31st day of July, 1975.

[Signature Illegible]
Notary Public

My Commission expires:
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEP. 24, 1978
BONDED THRU GENERAL INSURANCE UNDERWRITERS



**EXHIBIT A**

THE MIAMI HERALD Thursday, July 17, 197

# Gurney, Co-Defendant Rest Their Defense; Rebuttals Set Today

GENE MILLER

with Larry Williams about purchase of some property in Dade County where you would be a silent investor" the prosecutor asked.

"NO, SIR," replied Kennie. He said it emphatically.

Kennie took the witness stand stripped to a dark blue suit, white shirt and blue tie, with a styrofoam cup of water in his hand and a cube in his mouth.

He told about going to school in Topeka, and other night school, "finally" getting a degree from Long Island University in 1956. He is now 51. He became a legislative liaison man for HUD in Washington in 1969 as a G-13 after retirement from the Navy.

To get to Florida, where he had been Medical Advisor at Jacksonville, he took a drop in grade to G-11. "And since I've been suspended without pay, they've dropped me to C-12," he added, "I don't know why."

Harvey Schlesinger, chief prosecutor, turned from his chair, [illegible] U.S. District Court Judge Ben Krentzman and whispered, "I am going to take a position." Krentzman was [illegible] 3:24 p.m.

A petition to a statement by the witness explaining what he would reply to a question [illegible] answer it. The judge listens to the petition out of the hearing of the jury and decides whether it's admissible testimony. If the testimony is to be allowed, the jury is [illegible] asked in to hear the answer.

Kennie spent several minutes before the judge in closed conference, telling him how he would answer Dittmer's question about the leasing pay.

Under instructions from Krentzman, court reporter Tyd Idath [illegible] to read Kennie's statement to prosecutor.

The jury returned at 2:32 p.m.

Dittmer's question was read again: Had the government wanted Kennie to change his testimony?

"The answer is no," replied Kennie. There were other questions.

Kennie, a striking, tanned athlete-at-heart, shows Kenna native with an unorthodox personality, took the witness stand and said he had not met his co-defendant, Beckham, until they were introduced at the trial.

SHONTZ said he knew Larry Williams, the sole-employed Gurney fund-raiser who testified he collected $400,000 in cash from Florida builders in Gurney's name.

"What his position was, I don't know til this day — even after testifying five months[illegible]," said Kennie.

"Did you know he was a fund-raiser for Sen. Gurney?" asked U.S. Attorney Ralph Hutchison.

"I did not," said Kennie. "Never knew."

Williams, said Kennie, didn't like his boss, Florent Howell.

"I DON'T think Williams liked anybody very much. I don't think he liked me very much; anybody who worked in the executive branch of the government was a bureaucrat and no good.

"I don't remember discussing any project with Larry Williams," Kennie declared.

Prosecutor Hutchison read through a list of FHA projects, producing some other names before he read [illegible] about FHA mortgages.

"Did you give a list of builders to Larry Williams?" the prosecutor asked.

"I may have," said Kennie. "They were certainly available to anyone who asked for them."

"Did you ever have a discussion



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JUL 30 0 17 AM '75.

# Defense rests in Gurney trial

RALPH KOONTZ
. . . final defense witness.

By ANGEL CASTILLO JR.
St. Petersburg Times Bureau

TAMPA — The defense rested its case Wednesday at the U.S. District Court trial of former Republican U.S. senator Edward J. Gurney and three others, clearing the way for jury deliberations to begin sometime next week.

One of the final defense witnesses at the 21-week-old trial was defendant Ralph M. Koontz.

After denying having participated in an alleged fund-raising conspiracy and having been cross-examined by the prosecution, Koontz was asked a potentially explosive question by Gurney's lawyer, C. Harris Dittmar of Jacksonville.

**IN THE PRESENCE** of the jury, Dittmar asked Koontz if the prosecutors had once promised not to indict him as long as he changed his testimony and implicated Gurney in the fund-raising.

Koontz, 51, former assistant in Jacksonville to the Florida area director of the U.S. Department of Housing and Urban Development (HUD), was prevented from answering by a loud objection from chief prosecutor Harvey E. Schlesinger.

Schlesinger, an assistant U.S. attorney in Jacksonville, jumped to his feet and demanded that the jury be immediately led out of the courtroom. This done, he approached Judge Ben Krentzman to voice a lengthy objection in secret to Dittmar's question.

**REPORTERS** covering the trial from the spectator benches could not hear what went on. All lawyers in the case, as well as Koontz, Gurney and co-defendants Joseph Bastien and K. Wayne Swiger stood near Krentzman as the debate continued.

Koontz then left the huddle with his lawyer, Carlton Maddox of Jacksonville, and the two conferred in private for a few moments.

Immediately thereafter, Koontz and Maddox rejoined the huddle. Koontz was seen giving testimony to Krentzman that was taken down by the court stenographer, including answers to questions from Krentzman and Schlesinger.

**AFTER THE** lengthy proceeding, the jury was brought back into the courtroom and Krentzman had the court reporter re-read Dittmar's question about alleged promises to Koontz by the prosecutors.

Koontz replied: "No." He then was excused as a witness, and there was no more public discussion of the matter.

Reporters for The St. Petersburg Times and the Miami Herald made a formal request to court stenographer Ted Mack for a transcript of Koontz' testimony by the judge's bench.

After checking with the judge in his chambers, Mack said: "He (Krentzman) said that was a proffer and not testimony, and the answer about the transcript is negative."

**A "PROFFER"** is a legal term used by lawyers to describe what they believe the evidence would be if a certain witness were called to testify or certain documents were presented at the trial.

After the jury was sent home at the end of the day, Krentzman addressed reporters from the bench: "Those matters were proferred outside the presence of the jury, and I've directed the court reporter to seal them. You will not be able to get that."

Krentzman had acknowledged earlier that he has taken a number of such secret proffers during the trial outside the hearing of the jury and reporters. He says he can keep such matters secret under his discretionary powers as a judge.

EXHIBIT B

App. 50

EXHIBIT C



Jury Deliberates for Third Day

# Jury Quits Deliberations; They'll Try Again Today

TAMPA — The jury in the bribery conspiracy trial of Edward Gurney quit its deliberations without a verdict Wednesday. It will try again Thursday.

At 4:25 p.m. juror James Baker, the apparent foreman, knocked on the door and gave a U.S. marshal a single sheet of paper from a yellow pad. The jury quit for the day at 5:30 p.m. It had deliberated 12 hours since it began on Monday.

U.S. DISTRICT Judge Ben Krentzman summoned prosecution and defense lawyers and they met at a bench conference for 35 minutes.

After a 19-minute recess to prepare a written response to the jury, Krentzman again summoned the lawyers for a secret bench conference.

He was overheard to say, "I have it under advisement and I will advise you tomorrow morning."

THEN A NOTE from Krentzman was delivered to the jury at 8:57 a.m. Thursday. It had deliberated 17 hours since it began on Monday.

Krentzman instructed lawyers to return to court at 9 a.m. Thursday.

The note from the jury was made a court exhibit, which normally is a public document. The clerk refused to let newsmen inspect it, saying the judge had instructed him not to permit it.

App. 51

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

CASE NO. 74-122-CR-J

UNITED STATES OF AMERICA,

vs.

EDWARD J. GURNEY, JAMES L. GROOT, EARL M. CRITTENDEN, GEORGE ANDERSON, JOSEPH BASTIEN, WAYNE SWIGER and RALPH M. KOONTZ.

**AFFIDAVIT OF ANGEL CASTILLO**

STATE OF FLORIDA )
: SS
COUNTY OF HILLSBOROUGH )

Angel Castillo, being duly sworn, hereby deposes and says:

1. I am a reporter for The St. Petersburg Times, a newspaper published by Times Publishing Company, assigned to cover the trial in this matter since its commencement. I have been in daily attendance at the trial. I have personal knowledge of the matters set forth herein.

2. On July 30, 1975 the Judge in this cause received a written communication from the jury on a single yellow sheet of paper. I requested permission from



the Clerk to read the communication, which permission was denied.

3. On July 31, 1975 I asked the presiding judge in this cause personally for permission to read the communication from the jury and the judge denied my request saying that the communication would be available for inspection after the jury returned a verdict.

4. Subsequently on July 31, 1975 the Judge prepared and caused to be delivered to the jury in this cause a written response to their prior communication to him. Gene Miller, a reporter for the Miami Herald, in my presence and for our mutual use requested the Clerk of the Court to permit our inspection of the Judge's written response to the jury. We were refused.

/s/ Angel Castillo
Angel Castillo

SWORN TO and SUBSCRIBED before me this 31st day of July, 1975.

[Signature Illegible]
NOTARY PUBLIC

My Commission expires:
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEP. 24, 1978
BONDED THRU GENERAL INSURANCE UNDERWRITERS

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA

MIDDLE DISTRICT OF FLORIDA

I, WESLEY R. THIES, CLERK, of the United States District Court in and for the Middle District of Florida, and as such the legal custodian of the records and files of said Court do hereby certify that the foregoing documents number 1 to 20, inclusive, are the original papers in the cause of: MIAMI HERALD PUBLISHING COMPANY, ET AL, PETITIONER'S, VS., BEN KRENTZMAN, RESPONDENT - Case No. 74-122-Cr-J-K, to be included in the record on appeal.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Court at Tampa, Florida, on this 20th day of August, 1975.

WESLEY R. THIES, CLERK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BY [Signature Illegible]
Deputy Clerk



[BRACKETED NUMBERS INDICATE PAGE OF THE TRANSCRIPT]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 74-122-CR-J

UNITED STATES OF AMERICA

-vs-

EDWARD J. GURNEY, JAMES L. GROOT, EARL M. CRITTENDEN, JOSEPH BASTIEN, WAYNE SWIGER, RALPH M. KOONTZ

February 20, 1975
At Tampa, Florida
Before HON. BEN KRENTZMAN, Judge

**[EXCERPTS FROM]**
**REPORT OF STATUS HEARING**

[Status Hearing was open only at commencement, and closed to press and public as shown herein shortly thereafter. Finally transcribed in January, 1978. The bracketed page references indicate the page of the full transcript in which the words appear.]

EDWARD R. MACK, Official Reporter (Ret.)
830 Hillsboro Building, 512 Florida Avenue,
Tampa, Florida 33602

* * *

[17] And I'm going to hear you as to why, in your judgment, that should merit either a continuance or whatever; but I'm going to do that outside the presence of the press; and I'm going to do it simply because if there is any merit to your motion — and I will decide that — there is no reason to add any additional merit to it by discussing whatever you have got to say in the way of your views about this.

And that's that.

Thank you very much, ladies and gentlemen. You may now go outside the Courtroom.

If there are any Defendants here, they may remain and the attorneys may remain.

PROCEEDINGS AT CLOSED HEARING

(Thereupon, the following proceedings were had at the closed hearing above-recited, outside the presence of the press and other spectators.)

* * *

[41] MR. FLOYD: Has Your Honor considered — instead of taking the position, Your Honor, that the Crittenden plea, which has now been furnished. It is a public record. It is in each of our hands now. Instead of keeping that a secret — on behalf of the Defendant Groot it would remove at least some of the stigma if that were announced. And at least it would eliminate one of the remaining six.

THE COURT: Announced what? Who it is?



MR. FLOYD: Yes, sir.

THE COURT: Oh. Yes.

I sent the press off. I guess that was a mistake.

[42] But I doubt if they went very far away.

I'm not going to announce anything.

I told all of you not to talk to the press. I don't know how they know it. Maybe they will find out all about it.

I sometimes — I don't know. But —

* * *

[51] MR. DITTMAR: Yes, Your Honor. I think the public ought to be acquainted with the letter of February 19, 1975. The whole facts. To show what kind of plea arrangement has been made with Mr. Crittenden at this time.

THE COURT: Well, the public is not concerned. The only persons concerned are the Jurors. Legitimate concern.

[81] THE COURT: All right. What else?

MR. FLOYD: Well, Your Honor, I don't know that it has been made, but the Defendant Groot would at this time move that the Jury, after selection, be sequestered.

THE COURT: I asked you about that. I did not make the decision.

you coming into the building, they may say 'Good morning' or 'Good afternoon' — but they are being instructed not to do that."

Not to talk about, with members of the Jury — this is when they are not sequestered, of course — about anything, period.

And that avoids somebody from the Government coming in and saying, "Judge, I saw Mr. So-and-so say something to a juror and I don't know what it was."

Or you saying, "One of the District Attorneys was smiling at a juror as he came in the room and I wish you would tell him to stop."

And that's the reason.

So I tell the jurors that and I tell the press that. And we will do that at the time of the trial.

* * *



IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NO. 74-122-CR-J

EDWARD J. GURNEY, JOSEPH BASTIEN,
WAYNE SWIGER, RALPH M. KOONTZ

July 2, 1975

At Tampa, Florida

Before HON. BEN KRENTZMAN, Judge

**[EXCERPTS FROM]**
**TRIAL TRANSCRIPT**

(TESTIMONY OF EDWARD J. GURNEY)

[Transcribed on a daily basis, but not filed with the District Court until January, 1978.]

EDWARD R. MACK, Official Reporter
326 Post Office Building
Tampa, Florida 33601

(Upon the resumption of the trial on July 2nd, 1975, at 9:00 o'clock A.M., pursuant to the adjournment, the following further proceedings were had in the absence of the jury and at the bench, out of the hearing of spectators:)

THE COURT: Come forward, gentlemen.

* * *

THE COURT: Now this is a problem. I am going to deny that motion.

The trial — the jury is waiting now.

[34] I just — this is a matter that really deserves my attention in an Order that says something, but how I am going to do it — my secretary of eight years has just retired; my Senior Law Clerk has just retired and I have got a new Law Clerk. And I am trying to arrange a calendar for a visiting Federal Judge who is going to try some people who are in jail, who is coming Monday; with all of those attendant details.

How I am supposed to go back and write an erudite opinion about something, I don't know, but I have got to enter an Order.

Rule 55 says I should enter an Order, and I should have entered an Order the last time and I am going to enter an Order now.



And so I come to the question that up until now the Clerk has not allowed inspection of any of the motions or any other things, under my instructions.

And I am beginning to wonder, after having heard from the representatives of the press Monday, whether that is proper.

Now the press said to me — I said [35] — and this was not Monday but in a colloquy with a member of the press before this case ever started — I said, "I am not too concerned about what happens at a Bench Conference for instance; because it is on the record. And, if there should be a conviction, the record will be transcribed and all the world will know what happens."

And he said to me, "Suppose you make rulings up at the bench which are consistently favorable to the defendant; and incorrectly so. And the jury has found not guilty. We can't go spending the money to have all of the transcripts. How would the press ever know that you were not — that you were denying to the government the right to present a fair trial?"

That is a good question.

Well this had not occurred to me because I considered myself so fair and equitable that I would never make a mistake. But that is a mistake when anybody begins to assume that.

That is what every dictator in the world has ever assumed. And I am not a dictator; but, on the other hand, some people [36] may think that some of my rulings are.

I am getting down to the point now that I think I am required just to file all of these motions and pleadings and file the Order.

* * *

MR. DITTMAR: Well, Your Honor, no harm will result to the United States of America or to the Comptroller General if that order is not made of record and available to [39] the press until after this case is completed.

THE COURT: But in the Court of Appeals or whatever — you people are going to go back and give some attention to some other things. I am going to be here looking at the press and my conscience.

At any rate, I made the initial decision and I think it is a proper one.

I am going to enter an order. I have said it is not going to be any Law Review article. It is not going to be as good as I could do if I took off about two days and wrote it.

But I am going to enter an order and I am going to try to enter it today. And I am going to direct the Clerk to keep all of the papers — you should have all of these papers now — and to enter on the record that I have made an Order, but seal the whole thing.

THE CLERK: Yes sir.



IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NO. 74-122-CR-J

EDWARD J. GURNEY, JOSEPH BASTIEN,
WAYNE SWIGER, RALPH M. KO ONTZ

July 7, 1975

At Tampa, Florida

Before HON. BEN KRENTZMAN, Judge

**[EXCERPTS FROM]**
**TRIAL TRANSCRIPT**

(TESTIMONY OF EDWARD J. GURNEY)

[Transcribed on a daily basis, but not filed with the District Court until January, 1978.]

EDWARD R. MACK, Official Reporter
326 Post Office Building
Tampa, Florida 33601

[4] (Thereupon the following proceedings were had at the Bench, out of the hearing of spectators:)

[6] THE COURT: Keep your voice down, Mr. LaPorte.

MR. LaPORTE: Yes, sir.

THE COURT: We are at the Bench. And the purpose, hopefully, is that the press won't hear about this unless you want to turn around and make a speech before the press, which I don't think you want to.

MR. LaPORTE: I am not attempting to make a speech to the press.

THE COURT: Keep your voice down.

I can hear you.



UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-1695

In re

THE WASHINGTON POST COMPANY,
POST-NEWSWEEK STATIONS,
CAPITAL AREA, INC.,
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS,
RADIO-TELEVISION NEWS DIRECTORS
ASSOCIATION,
SOCIETY OF PROFESSIONAL JOURNALISTS
(SIGMA DELTA CHI), MARYLAND
PROFESSIONAL CHAPTER,

Petitioners.

FILED

No. 76-1698

In re

THE A. S. ABELL COMPANY,

Petitioner.

No. 76-1699

In re

THE HEARST CORPORATION
(BALTIMORE NEWS-AMERICAN,
WBAL-TV, and WBAL RADIO
DIVISIONS),

Petitioner.

No. 76-1711

In re

WESTINGHOUSE BROADCASTING
COMPANY, INC.,

Petitioner.

WRIT OF MANDAMUS



BEST COPY AVAILABLE

On July 2, 1976, we stayed the order of the district court entered in United States v. Mandel, Criminal No. P-75-0822 which order directed the Clerk to seal all papers filed after June 17, 1976. We granted leave to the government and the defendants to file responses to the applications for a writ of mandamus on or before July 12, 1976. We have now carefully considered the responses that have been filed and have concluded that the order of the district court is an unnecessary prior restraint on freedom of the press in violation of the First Amendment to the Constitution of the United States.

It is accordingly ORDERED, ADJUDGED and DECREED that the United States District Court at Baltimore for the District of Maryland vacate its order entered on June 18, 1976, in No. P-75-0822 which order directed Mr. Schlitz, the Clerk of the Court, to place all subsequent filings in United States v. Mandel under seal. The Clerk of our court will immediately issue the appropriate writ of mandamus.

Done with the concurrences of Judge Butzner and Judge Widener, this 19th day of July, 1976.

United States Circuit Judge

A True Copy, Test:
William K. Slate, II, Clerk
By _____
Deputy Clerk

On July 2, 1976, we stayed the order of the district court entered in United States v. Mandel, Criminal No. P-75-0822 which order directed the Clerk to seal all papers filed after June 17, 1976. We granted leave to the government and the defendants to file responses to the applications for a writ of mandamus on or before July 12, 1976. We have now carefully considered the responses that have been filed and have concluded that the order of the district court is an unnecessary prior restraint on freedom of the press in violation of the First Amendment to the Constitution of the United States.

It is accordingly ORDERED, ADJUDGED and DECREED that the United States District Court at Baltimore for the District of Maryland vacate its order entered on June 18, 1976, in No. P-75-0822 which order directed Mr. Schlitz, the Clerk of the Court, to place all subsequent filings in United States v. Mandel under seal. The Clerk of our court will immediately issue the appropriate writ of mandamus.

Done with the concurrences of Judge Butzner and Judge Widener, this 19th day of July, 1976.

United States Circuit Judge

A True Copy, Test:
William K. Slate, II, Clerk
By _____
Deputy Clerk

Supreme Court, U. S.
FILED
MAR 29 1978
MICHAEL RODAK, JR., CLERK

No. 77-1010

# In the Supreme Court of the United States

OCTOBER TERM, 1977

MIAMI HERALD PUBLISHING COMPANY, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
*Solicitor General,*

BENJAMIN R. CIVILETTI,
*Assistant Attorney General,*

SIDNEY M. GLAZER,
ELLIOTT SCHULDER,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1010

MIAMI HERALD PUBLISHING COMPANY, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA[1]

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 558 F. 2d 1202.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 19-20) was entered on September 12, 1977. A petition for rehearing was denied on October 18, 1977 (Pet. App. 21).

[1]Petitioners have named as a respondent the district judge who presided in the criminal trial. But the judge is not a party to a case in which he presides. He could be made a party in a mandamus proceeding (see *Vendo Co.* v. *Lektro-Vend Corp.*, No. 76-156, decided January 23, 1978), but this case reached the court of appeals by appeal, not by petition for a writ of mandamus. The United States, the plaintiff in the criminal trial and one of the apparent beneficiaries of the contested judicial orders, would appear to be a proper respondent.

The petition for a writ of certiorari was filed on January 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court properly and consistently with the requirements of the First Amendment regulated the public disclosure by court personnel of matters that had not been disclosed to the jury.

2. Whether the news media are entitled to notice and a hearing before a district court may issue an order regulating disclosure by court personnel of information that is not before the jury in an ongoing criminal trial.

## STATEMENT

An indictment filed in the United States District Court for the Middle District of Florida charged Edward J. Gurney, then a United States Senator, and other defendants, with receiving bribes, making false declarations before a grand jury, and conspiracy to defraud the United States. The jury trial commenced on February 24, 1975.[2]

The case against Senator Gurney was of substantial public interest, and there was a great deal of pretrial coverage by the press. Prior to trial the district court discussed with counsel the techniques that should be used to shield the jury from prejudicial publicity. Defense counsel asked the court not to sequester the jury for what

[2]The present petition concerns only the first of two trials held on the charges in the indictment (Pet. 4 n. 1). Following the initial trial, which resulted in an acquittal on some counts and a hung jury on others, Senator Gurney was retried and acquitted on one of the remaining counts.



was expected to be a lengthy trial (Pet. App. 58). The court agreed not to sequester the jury, but, with the consent of all parties, adopted other prophylactic measures to insulate the jury from publicity about the case. These included repeated admonitions to the jurors not to listen to or view broadcasts concerning the trial and not to read any newspapers other than those furnished to them; articles about the trial were removed from the papers given to the jurors (Pet. App. 2, 34).[3] In deciding not to request sequestration, counsel relied on the fact that the district court expected to conduct certain proceedings surrounding the reception of evidence out of the hearing of the jury and the public (*ibid.*).[4]

Petitioners are newspapers and journalists who were interested in the trial. On several occasions during the trial, petitioner reporters sought to inspect particular documents and exhibits, some of which had been received in evidence and some of which had only been marked for identification. The clerk made available to petitioners materials that had been admitted in evidence and read to the jury; acting under the court's orders, however, the clerk refused to permit inspection of items marked for identification but not offered or admitted, and items admitted but not yet read or shown to the jury (Pet. App. 3).

[3]At the same time, efforts were made to accommodate reporters. A telephone room was provided for wire service representatives, reserved seating was secured for the press, and convenient seating was provided for a newspaper sketch artist (Pet. App. 2).

[4]In addition, the defendants and their attorneys were aware of the district court's order prohibiting them from discussing the case in public outside the courtroom (Pet. App. 57, 59). Petitioners do not challenge the validity of this "no comment" order (Pet. 9 n. 11).

On June 27, 1975, petitioners asked the district court to vacate the directives regulating disclosure of evidentiary materials (Pet. App. 22-28).[5] After conducting a hearing on petitioners' application (*id.* at 29-40), the district court, on July 1, 1975, issued a written order (*id.* at 41-44) permitting inspection of a particular defense exhibit (*id.* at 42) and allowing petitioners to examine all exhibits admitted in evidence subject to the schedule of the clerk (*id.* at 43). The court denied disclosure of exhibits identified but not received in evidence, and it reaffirmed its decision to conduct bench conferences with counsel outside the hearing of the press and public (*ibid.*).

The court also declined to allow disclosure of Senator Gurney's grand jury testimony, which had not been read to the jury in its entirety (*id.* at 42); the court permitted petitioners to obtain a transcript of the portion of the testimony that had been read to the jury (*id.* at 17). The district court also observed (*id.* at 43) that no one had suggested that the court "had ever directed petitioners or its representatives not to publish anything, or had ever prohibited petitioners or its representatives from obtaining from the court reporter, at their expense, any transcript of matters actually published to the jury."

On July 16, 1975, the district court orally denied petitioners' request to obtain a transcript of a proffer of testimony made at a bench conference (Pet. App. 45-47). On July 30, 1975, while the jury was deliberating,

[5]Petitioners also challenged the district court's refusal to permit the clerk to disclose (a) the list of all witnesses to be called at trial and (b) the names and addresses of the jurors (Pet. App. 23-24). The court permitted access to the witness list (*id.* at 43) but denied disclosure of juror information (*id.* at 42). Petitioners do not press this latter claim here.



petitioners requested, and the district court orally denied, permission to inspect a written communication from the jury and the court's written response (*id.* at 47-48, 52-53).

Petitioners appealed the district court's rulings, and the court of appeals affirmed (Pet. App. 1-18).[6] The court first concluded: (1) that petitioners have standing to assert whatever right of access to the various trial documents there may be; (2) that the district court's decisions were appealable; and (3) that the case was not moot despite the completion of the Gurney trial (*id.* at 6-9). The court then observed that this criminal case was "much publicized" (*id.* at 10), and that the district court had "employed reasonable 'remedial measures,' far short of prior restraints, to prevent possible prejudice and maintain an orderly trial" (*id.* at 17). The court of appeals concluded that the district court had "merely refused to allow the [petitioners] to inspect documents not a matter of public record" (*id.* at 10), and it held that under "present Supreme Court guidelines, we do not think that the press had any First Amendment right of access to those matters not available to the public" (*id.* at 13).

## ARGUMENT

1. Petitioners contend that this case raises important questions concerning the First Amendment right of the press to gather information about criminal cases. We doubt, however, that any question is properly presented. No order was entered against petitioners; the only orders involved in this case are directions the district court gave to court personnel. Moreover, petitioners were not parties to the criminal cases; even if they could have intervened,

[6]Petitioners previously had sought writs of mandamus and prohibition. The court of appeals denied the petition, and petitioners then pursued an appeal (Pet. App. 4 n. 4).

they did not attempt to do so. Cf. *Central South Carolina Chapter, Society of Professional Journalists* v. *United States District Court*, 551 F. 2d 559 (C.A. 4) (attempted intervention impermissible; journalists told to proceed by separate civil suit). Petitioners did not file a civil suit challenging the district court's orders. Although they once filed a petition for a writ of mandamus, they did not pursue that remedy further after it was denied (Pet. App. 4 n. 4). Petitioners simply "appealed" the district court's instructions to the clerk. But because petitioners are not parties to this case, they have no right to appeal.[7] The court of appeals therefore should not have entertained petitioners' arguments. Because the court of appeals lacked jurisdiction, this case does not present the questions petitioners desire to have resolved.[8] Cf. *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737.

2. *a.* Even if we are mistaken about petitioners' right to appeal, there is no reason for this Court to grant the petition. This is not a case like *Nebraska Press*

[7]See *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581. A nonparty subject to a court order may appeal despite this rule, but the exception pertains only to the addressees of the order. A nonparty merely affected by an order directed to a party has no right to appeal; the nonparty must intervene first. Compare *Commercial Security Bank* v. *Walker Bank & Trust Co.*, 456 F. 2d 1352 (C.A. 10), with *Tryforos* v. *Icarian Development Corp.*, 518 F. 2d 1258, 1263 n. 22 (C.A. 7).

[8]We agree with the court of appeals, however, that this case is not moot (see *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 546-547), that an appeal is proper if petitioners are to be treated as parties, and that petitioners have standing to assert a claim of "access" to information. The press has standing because the "access" claim depends on the asserted needs of reporters. See *United States* v. *Cianfrani*, C.A. 3, No. 77-2445, decided March 16, 1978, slip op. 9-11. But the conclusion that the press has standing does not mean that there is a right of access; it means only that petitioners are appropriate persons to litigate whether there is such a right. For the reasons stated in the text, we do not believe there is.



*Association* v. *Stuart*, 427 U.S. 539, in which the court prohibited reporters from publishing information known to them; here no orders were directed to reporters. It is not even a case like *Central South Carolina Chapter* v. *Martin*, 556 F. 2d 706 (C.A. 4), certiorari denied, January 9, 1978 (No. 77-263), in which the trial court regulated pretrial statements by potential trial participants.[9] It is, instead, a case in which the district court (a) decided to conduct bench conferences *sotto voce*, and (b) told his clerk not to release copies of materials that had not been admitted in evidence.

Whatever special rules may be appropriate for "gag orders" (as in *Nebraska Press)* and "no comment orders" (as in *Martin*), they do not pertain to ordinary orders regulating the conduct of an ongoing trial. The court of appeals here simply recognized the traditional responsibility of district courts to prevent prejudicial disclosures by instructing court personnel not to release material that had not been admitted in evidence. In so doing, the court protected the rights of both the United States and the defendants to a fair trial designed to end in a just judgment.

*b.* The district court did not prohibit the publication of information known to the press, and petitioners disclaim (Pet. 13 n. 14) any special right to gain "access to information not shared by members of the public generally." *Pell* v. *Procunier*, 417 U.S. 817, 834. Petitioners contend, however, that they have a right to the "public records" of a public trial. But petitioners'

[9]The district court issued a "no comment" order in this case, but petitioners do not challenge it (Pet. 9 n. 11). Much of the reasoning we advanced in support of the court's order in *Martin* is applicable here, however. We are therefore furnishing petitioners with a copy of our brief in opposition in that case.

argument begs the question. No one would deny to petitioners access to public records; the question, rather, is whether all court records and proceedings must be "public."[10]

This Court has recognized that the right of the press to obtain access to court proceedings "must necessarily be subject to the maintenance of absolute fairness in the judicial process." *Estes* v. *Texas,* 381 U.S. 532, 539 (reversing a conviction obtained after a televised trial). Although the press has a right to publish information in the public domain, [11] no case has held that the press has a constitutional right to compel the court to make particular information public. To the contrary, the Court

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[10]This case therefore has nothing in common with *United States* v. *Mitchell,* 551 F. 2d 1252 (C.A.D.C.), certiorari granted *sub nom. Nixon* v. *Warner Communications, Inc.,* 430 U.S. 944, argued November 8, 1977, to which petitioners refer. That case involves access after trial to oral recordings that were admitted in evidence. This case, by contrast, involves access during trial to materials that were not admitted. Petitioners now have full access to the entire record of the present case; there was a delay in access, but not a permanent denial.

Petitioners also can draw no support from *In re Washington Post Co.,* C.A. 4, No. 76-1695, decided July 9, 1976 (Pet. App. 67-68). That unpublished order set aside a decision of a district court sealing all papers filed in a criminal case. Here, by contrast, the order pertained only to matters not yet admitted in evidence.

Finally, this is not a case in which a hearing was entirely closed or records permanently sealed. One court has held that the Sixth Amendment places restraints on such closings. *United States* v. *Cianfrani, supra.* But that court also rejected First Amendment arguments against the closure, endorsing the decision in the instant case (slip op. 40-41).

[11]See, *e.g., Oklahoma Publishing Co.* v. *District Court,* 430 U.S. 308; *Nebraska Press Association* v. *Stuart supra; Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469.



has repeatedly suggested that, in appropriate cases, trial courts may control information to prevent prejudicial disclosures. See, *e.g., Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 553-554, 564; *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469; *Branzburg* v. *Hayes,* 408 U.S. 665, 684-685; *Sheppard* v. *Maxwell,* 384 U.S. 333, 355, 358-363. Mr. Justice Brennan, concurring in the judgment in *Nebraska Press,* stated that courts "may stem * * * the flow of prejudicial publicity at its source, before it is obtained by representatives of the press" (427 U.S. at 601). Mr. Justice Brennan also stated, correctly in our view, that "[i]t is very doubtful that the court would not have the power to control release of information by [court officials] in appropriate cases * * *" (*id.* at 601 n. 27).

Supervisory limitations on the disclosure of information by court officials are a less drastic alternative than prior restraints on the press. We believe that the only reasonable dispute concerns the circumstances under which courts should use limitations. Petitioners contend that the courts of appeals and the state courts have announced different rules for determining when restrictive orders are appropriate, and that this difference requires resolution by this Court.

But the cases to which petitioners refer (Pet. 18-22) involve either broad "no comment" orders or orders closing entire trials or hearings. This, to our knowledge, is the first case involving an order, directed only to court personnel, temporarily withholding matters not in evidence. Petitioners were permitted to be present during the entire trial and to report on what they saw and heard; no effort was made to prevent them from conducting interviews outside of court and gathering information by

their own devices.[12] The different verbal standards for use in "closure" and "no comment" cases therefore are beside the point in a case such as this one.[13]

The record in the present case demonstrates that the district court properly exercised its authority. The criminal proceedings were highly publicized. The jury was not sequestered. Any disclosure during trial of inadmissible or unadmitted evidence created a risk that the jury would learn of that evidence. The trial was difficult and lengthy, and the district court therefore was entitled to take reasonable precautions against prejudice.[14] Moreover, Fed. R. Crim. P. 6(e) independently forbade disclosure of Senator Gurney's grand jury testimony. Finally, the district court was not required to disclose the contents of communications to and from the jury. As the court of appeals soundly observed: "Compelling governmental interest in the integrity of jury deliberation requires that the privacy of such deliberations and communications dealing with them be preserved" (Pet. App. 17).

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[12]Petitioners do not challenge the district court's "no comment" order (Pet. 9 n. 11). That order, moreover, was directed only to the defendants and their attorneys (Pet. App. 59); it did not bar statements by potential witnesses or other persons with information about the case.

[13]We doubt, moreover, that the different verbal standards reflect truly different approaches to the question. We discussed that matter at greater length at pages 10-12 of our brief in opposition in *Central South Carolina Chapter* v. *Martin, supra,* and we rely on that discussion here.

[14]The bench conferences concerned evidence that had not yet been (and might never be) admitted, and the court therefore properly conducted them quietly. The reporters were allowed to remain in court, however, and those with sharp ears were free to report what they heard.



In sum, the district court's actions here would have been appropriate under any reasonable standard.[15] The withheld materials were placed in the public record once the jury returned its verdict. There was no censorship of the press or permanent denial of access to information. There is no conflict among the circuits concerning the standards for instructing court officials not to disclose during trial information that is not in evidence.[16] There is, therefore, no reason for review by this Court.

3. Petitioners also contend (Pet. 27-28) that they were entitled to notice and a hearing before the district court issued its orders. A similar question was presented concerning a "no comment" order in *Central South Carolina Chapter* v. *Martin, supra.* This Court denied the petition for a writ of certiorari in that case. There is no greater reason to grant review here, and the petition should be denied for the reasons stated at pages 15-17 of our brief in opposition in *Martin.* In both cases, the district courts' orders were addressed, not to the press, but

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[15]Petitioners express concern that the court of appeals, by not announcing a clear standard to guide district courts in future cases, has invited courts to close proceedings for no reason at all. We do not read the court of appeals' decision in this way, and we believe that information should be withheld only when it appears reasonable to do so to preserve the fairness of the trial. But however that may be, the failure of the court of appeals to announce a particular standard is not a reason for this Court to grant review, where, as here, the selection of one standard rather than another would not change the outcome.

[16]See also *Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue,* 45 F.R.D. 391, 401, 403: "[T]he district court has the power and duty to prohibit prejudicial disclosures by courthouse personnel, such as * * * clerks * * * and court reporters. * * * [Moreover,] it is established practice in many districts for bench conferences * * * to be conducted out of the hearing of all persons except the participants."

to the trial participants. Only the addressees of the orders are subject to penalties for disobedience, and thus only they have a sufficient stake in the validity of the orders to be entitled to a prior hearing.[17]

Moreover, the court of appeals concluded (Pet. App. 18), petitioners received a prompt and full hearing on their complaint that certain materials should not be withheld from the public domain. Following that hearing, the district court permitted disclosure of some items and explained its reasons for prohibiting exposure of the remaining material. These procedures were adequate to protect whatever interest petitioners may have had in disclosure of the material. As the court of appeals explained (Pet. App. 18 n. 15):

> it is unreasonable to require a district judge to hold hearings and to issue special orders with respect to every request he is presented with by the press during the course of a long trial. * * * It is the trial court's responsibility to decide which documents will be placed in the public domain, and which are entitled to privacy and confidentiality. These decisions are discretionary, numerous, and form an integral part of trial management. The efficient administration of the trial courts would be significantly impaired should we require hearings and special orders for each such decision.

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[17]If, as petitioners concede (Pet. 13 n. 14), the press has no greater right than the general public to scrutinize inadmissible evidence in the midst of a criminal trial, then presumably members of the public are similarly entitled to the same right to notice and hearing claimed by petitioners. Such a requirement would create considerable problems of notice and opportunities for disruption of an ongoing trial.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1978.